Supreme Court, U.S.
FILED
07-259 AUG 22 2007
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

VLADIMIR IOURI AND VERA YURIY,

Petitioners,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

DAN KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

IRINA KOGAN
2612 Avenue Y
Brooklyn, NY 11235
(718) 621-5970

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

QUESTION PRESENTED

Orders of removal often include periods of voluntary departure that permit aliens to leave the country on their own terms. Voluntary departure saves the government the cost of expelling an alien from the country, while allowing the alien to leave for a destination of his or her choosing and to avoid various penalties associated with forced deportation. After exhausting administrative remedies, an alien who has been adjudicated removable may petition for judicial review in the federal courts of appeals. Filing a petition for review does not automatically stay either deportation or voluntary departure, however. An alien must move the court for such relief.

Against this background, the question presented is:

Whether the Second Circuit erred by holding, in express disagreement with the rule applied by the Sixth, Eighth, and Ninth Circuits, that a motion to stay deportation does not necessarily also include a request to stay the running of the voluntary departure period.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
PROVISIONS INVOLVED 1
STATEMENT 2
REASONS FOR GRANTING THE PETITION 8
I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A MOTION TO STAY REMOVAL CONTAINS A REQUEST TO STAY VOLUNTARY DEPARTURE 10
A. The Second Circuit's Holding That A Motion To Stay Removal Does Not Also Include A Motion To Stay Voluntary Departure Directly Conflicts With Decisions From The Sixth, Eighth, And Ninth Circuits 10
B. The Capriciousness In The Administration Of National Immigration Laws Resulting From The Conflict At Issue Here Should Not Be Tolerated 16
II. THIS CASE PRESENTS AN ISSUE OF GREAT PRACTICAL IMPORTANCE 18
III. THE SECOND CIRCUIT'S DECISION IS WRONG 21
A. Because Voluntary Departure And Removal Are Complementary Facets Of The Same Administrative Order, There Is No Point To Requiring An Individual Statement Of The Desire To Stay Both 21

TABLE OF CONTENTS
(continued)

Page

B. The Availability Of An Ineffective Assistance Of Counsel Claim Means That The Second Circuit's Rule Adds Great Inefficiency To the Resolution Of Immigration Cases 25

C. The Decision Below Offends This Court's Command To Resolve Ambiguities In Favor Of Aliens 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Alimi v. *Ashcroft*, 391 F.3d 888 (7th Cir. 2004) ..... *passim*

Ballenilla-Gonzalez v. *INS*, 546 F.2d 515 (2d Cir. 1976) 15

Barroso v. *Gonzales*, 429 F.3d 1195 (9th Cir. 2005) 27

Batanic v. *INS*, 12 F.3d 662 (7th Cir. 1993) 24

Benslimane v. *Gonzales*, 430 F.3d 828 (7th Cir. 2005) 23

Bocova v. *Gonzales*, 412 F.3d 257 (1st Cir. 2005) ..... *passim*

Cardenas v. *Gonzales*, No. 07-71090, 2007 WL 2162668 (9th Cir. July 27, 2007) 19

Contreras-Aragon v. *INS*, 852 F.2d 1088 (9th Cir. 1988) 4

Costello v. *INS*, 376 U.S. 120 (1964) 27

Desta v. *Ashcroft*, 365 F.3d 741 (9th Cir. 2004) ..... *passim*

El Himri v. *Ashcroft*, 344 F.3d 1261 (9th Cir. 2003) 4

Fiadjoe v. *Attorney General*, 411 F.3d 135 (3d Cir. 2005) 24

Flores v. *Gonzales*, No. 07-71291, 2007 WL 2162693 (9th Cir. July 27, 2007) 19

Fong Haw Tan v. *Phelan*, 333 U.S. 6 (1948) 27

Foti v. *INS*, 308 F.2d 779 (2d Cir. 1962) 3, 15

Garcia v. *Gonzales*, No. 07-70728, 2007 WL 2162639 (9th Cir. July 27, 2007) 19

Graham v. *Richardson*, 403 U.S. 365 (1971) 17

Hayat v. *Gonzales*, 205 Fed. App'x. 904 (2d Cir. 2006) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Henderson v. *Mayor of New York*, 92 U.S. 259 (1875) 19

Iavorski v. *INS*, 232 F.3d 124 (2d Cir. 2000) 25, 26

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 16, 26

INS v. *Errico*, 385 U.S. 214 (1966) 27

INS v. *St. Cyr*, 533 U.S. 289 (2001) 26

Kenyeres v. *Ashcroft*, 538 U.S. 1301 (2003) ..... *passim*

Korytnyuk v. *Ashcroft*, 396 F.3d 272 (3d Cir. 2005) 24

Larios v. *Gonzales*, No. 07-70447, 2007 WL 2162364 (9th Cir. July 27, 2007) 19

Lopez-Chavez v. *Ashcroft*, 383 F.3d 650 (7th Cir. 2004) 4

Lopez-Umanzor v. *Gonzales*, 405 F.3d 1049 (9th Cir. 2005) 24

Macotaj v. *Gonzales*, 412 F.3d 704 (6th Cir. 2005), *modified on pet. for reh'g*, 424 F.3d 464 (6th Cir. 2005) ..... *passim*

Massachusetts Trustees v. *United States*, 377 U.S. 235 (1964) 20

Neri v. *Gonzales*, No. 07-70571, 2007 WL 2162484 (9th Cir. July 27, 2007) 19

Ngarurih v. *Ashcroft*, 371 F.3d 182 (4th Cir. 2004) 4, 11

Nwakanma v. *Ashcroft*, 352 F.3d 325 (6th Cir. 2003) 4

Obale v. *Attorney General*, 453 F.3d 151 (3rd Cir. 2006) 4

Qeraxhiu v. *Gonzales*, 206 Fed. App'x. 476 (6th Cir. 2006) 26

Rife v. *Ashcroft*, 374 F.3d 606 (8th Cir. 2004) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Romero v. *Gonzales*, No. 04-71296, 2007 WL 2161640 (9th Cir. July 27, 2007) 20
Sosnovskaia v. *Gonzales*, 421 F.3d 589 (7th Cir. 2005) 23
Ssali v. *Gonzales*, 424 F.3d 556 (7th Cir. 2005) 23
Tedjo v. *Gonzales*, 214 Fed. App'x. 69 (2d Cir. 2007) 17
Thapa v. *Gonzales*, 460 F.3d 323 (2d Cir. 2006) 4
Vidal v. *Gonzales*, 491 F.3d 250 (5th Cir. 2007) 4
Wang v. *Attorney General*, 423 F.3d 260 (3d Cir. 2005) 24
Xiao Feng Huang v. *INS*, 204 Fed. App'x. 99 (2d Cir. 2006) 17, 20
Zazueta-Carrillo v. *Ashcroft*, 322 F.3d 1166 (9th Cir. 2003) 23

Constitution and Statutes

U.S. Const. Art. I, § 8, cl. 4 17
8 U.S.C. § 1105a(a)(3)(b) (1994) 4
8 U.S.C. § 1182(a)(9)(A)(ii) 3, 17
8 U.S.C. § 1229c 3
8 U.S.C. § 1229c(b)(1) 1
8 U.S.C. § 1229c(d) 3, 6, 17
8 U.S.C. § 1252 3
8 U.S.C. § 1252(b)(3)(B) 1, 2, 4
8 U.S.C. § 1252(b)(2) 16
28 U.S.C. § 1254(1) 1
REAL ID Act, Pub. L. No. 109-13, § 106(d), 119 Stat. 231, 311 (2005) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

Immigrant Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) 4

Immigration and Nationality Act of 1952

§ 240B 1, 3

§ 240A 23

§ 245 23

§ 248 23

§ 249 23

Regulations

8 C.F.R. § 1003.1 3

8 C.F.R. § 1240.26 ..... 3, 17

8 C.F.R. § 1240.26(d) 1, 22

8 C.F.R. § 1241.1(f) ..... i, 3, 17, 22

Miscellaneous

2006 Judicial Business of the United States Courts, available at http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf. 18

Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493 (2001) 18

U.S. Department of Justice, Executive Office of Immigration Review, *FY 2006 Statistical Year Book*, (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. 3, 19, 22

OPINIONS BELOW

The modified opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 487 F.3d 76. The court's original opinion (App., *infra*, 23a-41a), prior to modification on petition for rehearing, is reported at 464 F.3d 172.

JURISDICTION

The Court of Appeals issued its initial opinion on September 11, 2006. Petitioner sought rehearing on October 10, 2006. The Court of Appeals denied rehearing and issued a modified opinion on May 24, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY & REGULATORY PROVISIONS INVOLVED

Section 240B of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1229c(b)(1), provides in relevant part: "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240, the immigration judge enters an order granting voluntary departure * * *."

Section 304 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(b)(3)(B), provides in relevant part: "[s]ervice of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."

8 C.F.R. § 1240.26(d) provides in relevant part: "[u]pon granting a request made for voluntary departure * * * the immigration judge shall also enter an alternate order of removal."

8 C.F.R. § 1241.1(f) provides in relevant part: "[An order of deportation] shall become final * * * upon overstay of the voluntary departure period * * *."

STATEMENT

This case presents a question of immigration law that has deeply divided the courts of appeals. Expressly rejecting the rule applied by the Sixth, Eighth, and Ninth Circuits, the Second Circuit instead joined the First and Seventh Circuits in holding that a motion filed under Section 304 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1252(b)(3)(B), to "stay the removal of an alien" does not also include a motion to stay the time accorded the alien to depart the country voluntarily. That holding has significant practical consequences for affected aliens: the determination that aliens failed to seek a stay of their voluntary departure period subjects them to a range of harsh penalties, including ineligibility for adjustment of status.

This conflict of authority is producing bizarre inconsistencies in the administration of the national immigration system. As a result of the divergent approaches taken by the courts of appeals, an alien in the Sixth, Eighth, and Ninth Circuits may obtain adjustment of status and remain lawfully in the United States while an identically situated alien in the First, Second, and Seventh Circuits will be expelled from the country. If petitioners here—an elderly, law-abiding married couple—lived in Cleveland, St. Louis, or Los Angeles, they would be lawful permanent residents of the United States; because they reside instead in New York, they are subject to deportation.

This sort of divergent application of federal immigration law is intolerable. Because the Second Circuit's rule also encourages wasteful litigation, is inconsistent with federal immigration policy, leads to profoundly inequitable results, and cannot be squared with the approach taken by this Court to the interpretation of questions of immigration law, further review is warranted.

1. Statutory Background. When an immigration judge (IJ) orders the removal of an alien, the order often includes a

period of voluntary departure. See Immigration and Nationality Act (INA) § 240B, 8 U.S.C. § 1229c; see also 8 C.F.R. § 1240.26.[1] This alternative to forced removal is an important and frequently invoked element of federal immigration policy: the Department of Justice made voluntary departure available to more than 22,000 aliens in 2006. See U.S. Department of Justice, Executive Office for Immigration Review, *FY 2006 Statistical Year Book*, tbl. 14 (Feb. 2007), *available online at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. In addition to saving the government the cost of removal proceedings and transportation expenses, voluntary departure allows the alien to avoid various penalties associated with forced removal. See 8 U.S.C. § 1182(a)(9)(A)(ii). Aliens may appeal an IJ's removal order or offer of voluntary departure to the Board of Immigration Appeals (BIA). See 8 C.F.R. § 1003.1. If the BIA rules against the alien on appeal, he or she may petition for judicial review in a federal court of appeals. 8 U.S.C. § 1252.

Stiff penalties apply if an alien is granted voluntary departure but remains in the country past the running of the departure period. First, the order of voluntary departure automatically converts into an order of removal. 8 C.F.R. § 1241.1(f). In addition to incurring all the penalties associated with removal, aliens who overstay the voluntary departure period must pay a fine of at least $1,000 and as much as $5,000. 8 U.S.C. § 1229c(d). The alien also becomes ineligible for an administrative adjustment of their immigration status for a term of ten years. *Ibid.*

---

[1] Prior to the enactment of IIRIRA, the process of expelling an alien from the country was termed "deportation"; IIRIRA recharacterizes the process as "removal." Although actions seeking expulsion of aliens that were initiated prior to enactment of IIRIRA are still termed "deportation proceedings," these differences in terminology have no substantive implications for the question presented here.

Against this general background, two statutory provisions are particularly relevant to this case. First, prior to 1996, filing a petition for review before a court of appeals automatically stayed both deportation and the running of the period for voluntary departure. See 8 U.S.C. § 1105a(a)(3)(b) (1994) (superseded by Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)) (automatic stay of deportation upon petition for review); *Contreras-Aragon* v. *INS*, 852 F.2d 1088, 1091 (9th Cir. 1988) (en banc) (holding that the INA required automatic stay of voluntary departure); *Foti* v. *INS*, 308 F.2d 779, 784 (2d Cir. 1962) (acknowledging automatic stay of voluntary departure along with automatic stay of deportation). In 1996, however, Congress enacted IIRIRA, a comprehensive revision of the immigration laws. Among many other things, the law provides that filing a petition for review no longer *automatically* stays removal—instead, an alien must seek a stay. IIRIRA Section 304, 8 U.S.C. § 1252(b)(3)(B).

Although the law is silent as to judicial stays of voluntary departure, the courts of appeals have almost unanimously concluded that they have the power to stay voluntary departure pending review of an order of removal. See *Bocova* v. *Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005); *Thapa* v. *Gonzales*, 460 F.3d 323, 325 (2d Cir. 2006); *Obale* v. *Attorney General*, 453 F.3d 151,157 (3rd Cir. 2006); *Vidal* v. *Gonzales*, 491 F.3d 250, 252 (5th Cir. 2007); *Nwakanma* v. *Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Rife* v. *Ashcroft*, 374 F.3d 606, 615-16 (8th Cir. 2004); *El Himri* v. *Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003). Only the Fourth Circuit holds that it lacks the power to stay voluntary departure. See *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004).

Second, while this case was pending, Congress again revised the immigration laws. Of particular relevance here, the REAL ID Act of 2005, Pub. L. 109-13, § 106(d), 119 Stat. 231, 311 (2005), eliminated a jurisdiction-stripping provision of the IIRIRA. Prior to the REAL ID Act, compelled removal

of the alien from the country—but not voluntary departure—stripped the court of jurisdiction to continue hearing an alien's appeal. This rule was repealed by the REAL ID Act, so that an alien's forced departure no longer strips the appellate court of jurisdiction to decide the alien's petition for review. As a result, there is no material distinction in the function served by staying removal and staying voluntary departure; stays of both sorts allow the alien to remain in the country and to preserve the status quo during the pendency of judicial review.

2. Immigration Proceedings. Petitioners Vladimir Iouri and Vera Yuriy are a married couple in their late sixties. They are natives of the former Soviet Union and citizens of the now independent Ukraine. App., *infra*, 4a. Petitioner Iouri entered the United States in April 1993 as a non-immigrant visitor. *Id.* at 5a. Petitioner Yuriy followed her husband to the United States in August 1993, also as a non-immigrant visitor. *Ibid.* Immediately following their entry into the United States petitioners sought asylum, with petitioner Iouri claiming that he had been persecuted because of his membership in the Ukraine Orthodox Church and expressing a fear of future persecution should he be returned to Ukraine. *Id.* at 5a-6a. The IJ found petitioners' claims not credible and denied asylum relief, but granted petitioners' request for voluntary departure. *Id.* at 7a.

The BIA summarily affirmed the IJ's decision on November 27, 2002, granting petitioners a new voluntary departure period lasting until December 27, 2002. Prior to the expiration of the voluntary departure period, petitioners sought a stay of deportation from the Second Circuit on December 26, 2002, filing their petitions for review on December 26 and 27, 2002. *Id.* at 8a.[2]

---

[2] The Second Circuit treated the stay as granted. The Second Circuit's Clerk's Office informs us that, upon the filing of an unopposed motion to stay deportation in these circumstances, the U.S.

Around the same time, on November 25, 2002, the Immigration and Naturalization Service approved "immediate relative" petitions filed on petitioners' behalf by their only child, a daughter who is a United States citizen. App., *infra*, 8a. These petitions made petitioners eligible for lawful permanent residence. In January 2003, petitioners accordingly filed a motion before the BIA seeking to reopen proceedings so that they could apply for administrative adjustment of their status on the basis of the approved immediate relative petitions. The BIA denied their motion because, in its view, petitioners had overstayed their voluntary departure period and therefore were statutorily barred from receiving adjustment of status under 8 U.S.C. § 1229c(d). *Ibid.* Petitioners filed additional petitions for review before the Second Circuit to challenge that ruling.

3. The Second Circuit's Decision. The court below denied both sets of petitions. App., *infra*, 1a-22a. After rejecting the challenge to the denial of asylum, the court affirmed the BIA's conclusion that petitioners were ineligible for adjustment of status because they had overstayed their voluntary departure period. The court held that "an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay," reasoning that a request to stay voluntary departure was not subsumed within the motion to stay deportation that petitioners *did* file. *Id.* at 15a.

In its initial opinion (App., *infra*, 23a-41a), the court—failing to recognize that the jurisdiction-stripping provision of IIRIRA had been repealed—placed substantial reliance on the section of IIRIRA providing that removal, but not voluntary departure, eliminates a court's jurisdiction to resolve an appeal from a decision of the BIA. Believing that "[deporta-

---

Attorney's Office and the Department of Homeland Security will refrain from deporting the alien until the court's review is complete.

tion] strips this Court of jurisdiction to hear [petitioners'] petition for review" (App., *infra*, 35a), the court concluded:

> The relief sought by a stay of deportation * * * is different from that sought by a stay of voluntary departure. Whereas a stay of deportation is aimed at preserving the court's jurisdiction, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded.

Id. at 36a. Given these perceived differences in the two forms of relief, the court declined to "construe [petitioners'] stay of deportation automatically to include a stay of the period for voluntary departure." *Id.* at 37a.

Because the REAL ID Act of 2005 had repealed the jurisdiction-stripping provision of IIRIRA that underlay the Second Circuit's decision, petitioners sought rehearing. The court denied the petition. It did issue an amended opinion that deleted its erroneous statutory analysis, but insisted without explanation that "[n]otwithstanding the repeal of the IIRIRA transitional rules," stays of removal and stays of voluntary departure "continue to differ in both their practical and equitable respects." App., *infra*, 18a n.8. Thus, the court reiterated, "an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." *Id.* at 15a. In reaching this conclusion, the Second circuit expressly "disagree[d]" with the approach of the Eighth and Ninth Circuits, which (the Second Circuit acknowledged) "have held that where an alien files a motion to stay removal before the period for voluntary departure expires, such a motion should be construed as including a motion to stay the voluntary departure period." *Id.* at 15a. Instead, the Second Circuit aligned itself with the First and Seventh Circuits, "both of which have held that an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." *Ibid.*

While denying relief, the court below observed that "we are sympathetic to the position Petitioners find themselves in." App., *infra*, 20a. The court noted that both are "in their mid-to-late 60's and have been in the United States for more than a decade, without event. Their only child is a United States citizen, and the 'immediate relative' petitions she submitted on her parents' behalf have already been approved." *Id.* at 22a. Moreover, the court added, "it appears that any delay on Petitioners' part may be attributable to counsel's failure to recommend that they seek to extend their voluntary departure period before overstaying that period, an omission that thereby made them ineligible for adjustment of their status based on approved 'immediate relative' petitions." *Ibid.* The court nevertheless concluded that petitioners' failure expressly to seek a stay of voluntary departure was fatal to their position.

Following the Second Circuit's issuance of its modified opinion, petitioners moved the court of appeals to stay its mandate pending this Court's consideration of the present petition for certiorari, noting that the conflict in the circuits would make the petition a substantial one. Over the government's objection, the court granted petitioners' motion.

REASONS FOR GRANTING THE PETITION

This case squarely presents a recurring and frequently litigated question of immigration law that has deeply divided the courts of appeals. In direct conflict with decisions of the Sixth, Eighth, and Ninth Circuits but in accord with holdings of the First and Seventh, the Second Circuit ruled that a motion to stay of deportation should not be understood also to request a stay of voluntary departure.

Review by this Court is essential. The decision below is producing intolerable inconsistency in the administration of the national immigration system. The practical result of the divergent views among the lower courts with respect to the question presented is that aliens situated identically to petitioners will be *expelled from the country* in some circuits and

granted permanent lawful residence in others, with these radically divergent outcomes turning on nothing more than the location of their appeals.

In addition, wholly apart from deepening the conflict among the circuits, the position adopted by the Second Circuit in this case is interfering with the fair and efficient administration of the law. There is *never* any situation in which an alien seeking to stay removal pending resolution of a petition for judicial review will not also desire to stay expiration of a voluntary departure order. Forcing aliens to distinguish their request for the latter from their request for the former will thus serve no practical purpose. But precisely because it serves no purpose that would likely occur to a petitioning alien, such a requirement creates a predictable litigation trap. This trap, moreover, will ultimately inhibit finality in immigration proceedings and generate substantial *additional* work for immigration authorities and courts: when aliens' counsel fails to file two express motions, as here, aliens may pursue claims for ineffective assistance of counsel (see *Desta* v. *Ashcroft*, 365 F.3d 741, 748 (9th Cir. 2004)), thereby delaying their removal and effectively reopening their cases. The net effect of the Second Circuit's rule will therefore simultaneously be to "impede access to the courts in [often] meritorious cases," while undermining "Congress's deliberate effort * * * to relieve the courts from the need to * * * devote their scarce judicial resources" to the immigration docket. *Kenyeres* v. *Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers) (noting the "significant" importance of questions over when and how to issue judicial stays in immigration cases). Such a result should not be tolerated.

Obviously, the First and Seventh Circuits, and now the Second, have concluded that there are reasons why aliens should be required to individuate their requests for stays of removal and of deportation. We agree with the position of the Sixth, Eighth, and Ninth Circuits that those reasons—if they have any validity at all—are insufficient to outweigh the

wasteful and unfair consequences of such a rule. But whatever the correct outcome on the merits, it is clear that the conflict on this issue should be settled one way or other. The petition for a writ of certiorari therefore should be granted.

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A MOTION TO STAY REMOVAL CONTAINS A REQUEST TO STAY VOLUNTARY DEPARTURE.

As the Second Circuit itself acknowledged, the decision below deepens a conflict among the courts of appeals over whether a motion to stay deportation, filed before the time to depart voluntarily has run, also should be understood to include a request to stay voluntary departure. See App., *infra*, 15a. As a result of this split, aliens across the country are receiving dramatically disparate treatment in the application of the immigration laws by the courts of appeals. "Given the significant nature of the issue and the acknowledged disagreement among the lower courts" (*Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers)), this Court's review is necessary to restore uniformity to the administration of the Nation's immigration system.

A. The Second Circuit's Holding That A Motion To Stay Removal Does Not Also Include A Motion To Stay Voluntary Departure Directly Conflicts With Decisions From The Sixth, Eighth, And Ninth Circuits.

1. The Second Circuit concluded in this case that a stay of deportation does not "include a stay of the period for voluntary departure," so that "an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." App., *infra*, 18a, 15a. Two other courts of appeals have reached the same conclusion. See *Alimi* v. *Ashcroft*, 391 F.3d 888, 892-93 (7th Cir. 2004) (holding that a "stay of removal [does not] also extend [] the time for voluntary departure" because to hold otherwise "would be incompatible with the structure of § 1229c;" hence "a stay of removal and extra

time for voluntary departure [must be] treated as distinct subjects that must be separately addressed"); *Bocova* v. *Gonzales*, 412 F.3d 257, 268-70 (1st Cir. 2005) (because "there may be cases in which an alien is entitled to a stay of removal but not a stay of voluntary departure," "an alien must ask explicitly for a stay of voluntary departure; a motion that prays only for a stay of removal will not suffice").

As the Second Circuit recognized in expressly "disagree[ing]" with their holdings (App., *infra*, 15a), three other courts of appeals have reached the opposite conclusion, holding that a motion to stay deportation also necessarily contains a request to stay the period for voluntary departure. See *Macotaj* v. *Gonzales*, 412 F.3d 704 (6th Cir. 2005), *modified on pet. for reh'g*, 424 F.3d 464 (6th Cir. 2005); *Rife* v. *Ashcroft*, 374 F.3d 606 (8th Cir. 2004); *Desta* v. *Ashcroft*, 365 F.3d 741 (9th Cir. 2004).[3]

In *Desta* v. *Ashcroft*, the Ninth Circuit considered a case in which, as here, the petitioner had filed a motion to stay removal within the time set for departure. Although the motion did not expressly request a stay of voluntary departure, the Ninth Circuit held that a "motion to stay removal, filed before the * * * voluntary departure period ha[s] expired," is sufficient to preserve the court's "power * * * to stay voluntary departure." 365 F.3d at 745. The court went on to conclude that "the same substantive standards govern motions to stay removal and motions to stay voluntary departure," and hence "if the standard to stay removal is satisfied, the stan-

---

[3] The Fourth Circuit's decision that courts lack the authority ever to stay voluntary departure (*Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004)) is also relevant to the conflict here, insofar as it is at odds with the decisions from the Sixth, Eighth, and Ninth Circuits holding that they will stay voluntary departure upon a motion to stay removal. Granting review of the question presented here will necessarily also resolve this additional jurisdictional question on which the Fourth Circuit disagrees with the First, Second, Sixth, Seventh, Eighth, and Ninth Circuits.

dard to stay voluntary departure is necessarily satisfied." *Id.* at 748 (citations omitted). Thus, in direct conflict with the ruling below, the Ninth Circuit held:

> where an alien files a motion to stay removal before the period of voluntary departure expires, *we will construe the motion to stay removal as including a timely motion to stay voluntary departure. In granting a motion to stay removal * * * the court will also be staying the time remaining for the alien to depart voluntarily.*

Id. at 479 (emphasis added).

In *Rife* v. *Ashcroft*, the Eight Circuit also considered a situation in which the petitioners had "filed a motion to stay removal before their voluntary departure period expired," but had "fail[ed] to file a motion expressly seeking a stay of their voluntary departure period." 374 F.3d at 616. That court concluded that "a motion to stay voluntary departure complements and in many cases may be ancillary to a motion to stay removal pending judicial review." *Ibid.* (citing *Desta*, 365 F.3d at 749). Thus, although the Eighth Circuit (unlike the Ninth) believed that there may be "cases where the equities relevant to the two types of stay will balance differently," it nevertheless held that, if "the alien files a motion to stay removal before the period of voluntary departure expires, *we will deem the grant of that motion to include a stay of the voluntary departure period.*" *Ibid.* (emphasis added). Because the Second Circuit treated the stay of deportation here as granted, the outcomes in *Rife* and this case are irreconcilable.

Finally, in *Macotaj* v. *Gonzales*, which presented the same material facts, the Sixth Circuit endorsed the Ninth Circuit's analysis. It held:

> "the same substantive standards govern motions to stay removal and motions to stay voluntary departure. Thus, if the standard to stay removal is satisfied, the

> standard to stay voluntary departure is necessarily satisfied. * * * A motion to stay voluntary departure is thus in many ways 'ancillary' to a motion to stay removal, and *it is reasonable to construe a motion to stay removal to include a request to stay voluntary departure*."

Macotaj, 424 F.3d at 467 (emphasis added) (quoting *Desta*, 365 F.3d at 748). The Second Circuit's decision cannot be reconciled with this holding.

This conflict in the circuits is deep, settled, and widely acknowledged; "[t]he courts on each side of the split have considered the contrary opinions of their sister Circuits and have adhered to their own expressed views." *Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers). Thus, the First Circuit noted that the Seventh "has rejected" the approach of the Eighth and Ninth Circuits, and has aligned itself with the Seventh. *Bocova*, 412 F.3d at 268. See also *Alimi*, 391 F.3d at 892 (the Ninth Circuit's decision in *Desta* "does not persuade us"). The Sixth Circuit, in rejoinder, expressly rejected the position of the First and Seventh Circuits, seeing "no practical justification for [their] rationales." *Macotaj*, 424 F.3d at 467 n.1.[4] Such disarray demands this Court's attention.

---

[4] Indeed, there are conflicts within the conflicts. The First Circuit, while agreeing with the Seventh that an express motion to stay voluntary departure is required, has rejected the Seventh Circuit's imposition of an exhaustion requirement mandating that the alien first seek an administrative stay of voluntary departure. *Bocova*, 412 F.3d at 269. On the other side of the coin, the Sixth and Ninth Circuits have held that *every* stay of deportation will stay voluntary departure, while the Eighth Circuit has suggested that the equities may balance differently as to the two types of relief. As the Seventh Circuit put it, early in the life of the conflict, "[o]ne court has" held that "stay of removal [gives aliens] an extension [of voluntary departure] automatically," "[a]nother has rejected [that position]," "[s]till a third has split the difference, holding that a stay of re-

2. Each court implicated by the split in this case squarely decided the question presented on materially identical facts. The Second Circuit below nevertheless suggested that the decisions of the Eighth and Ninth Circuits might be distinguished on the ground that "their prior case law had given petitioners reason to believe that they need not file a motion for a stay of voluntary departure" (App., *infra*, 20a), while that concern is "absent here." *Id.* at 21a. We note that the Second Circuit made no attempt to distinguish the Sixth Circuit's conflicting decision on this ground. But the asserted distinction is, in any event, insubstantial.

First, the Eighth and Ninth Circuits' decisions rested upon a concern for the burdensome costs to both petitioners and the courts that would be imposed by a holding that a motion to stay removal does not also include a motion to stay voluntary departure (see, *e.g.*, *Desta*, 365 F.3d at 748), and on the nature of an order of removal as itself including the "complimentary" order to depart voluntarily (see, *e.g.*, *Rife*, 374 F.3d at 616). The Eighth and Ninth Circuits (and the Sixth, as well) thus announced blanket rules that would apply in all cases—including cases arising in the future, where issues of notice could not be present—holding on legal, and not case-specific, grounds that motions to stay removal would be treated as also seeking to stay voluntary departure. The Second Circuit's ruling cannot be reconciled with these holdings on any theory.[5]

---

moval does not automatically extend the time for voluntary departure but adding that the court may elect to treat the one as accomplishing the other," and "[y]et another [the Fourth Circuit] has held that appellate courts can never add to the time available for voluntary departure." *Alimi*, 391 F.3d at 891. Since that writing, four more circuits have weighed in.

[5] In fact, the Eighth and Ninth Circuits' brief references to prior Circuit case law were case-specific observations that addressed the equities of actually *issuing* stays, and were irrelevant to the courts'

Moreover, Second Circuit precedent does not support the court of appeals' suggestion that petitioners in this case *were* on notice that they had to file a separate motion. The court stated that in *Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515 (2d Cir. 1976), it had "expressed approval for procedures" that permitted appellate review to go forward "without prejudice to voluntary departure." App., *infra*, 21a. But *Ballenilla-Gonzalez* is an inapposite case that addressed the question whether the court should automatically *reinstate* an expired period of voluntary departure when a petitioner files *a petition for review* (not a stay application) *after* the time to depart has expired. The court there merely noted that the petitioner in that case had not "follow[ed] the procedure of filing a petition for review within the 30-day period fixed by the Board for voluntary departure." 546 F.2d at 521. The court never addressed whether the petitioners in *Ballenilla-Gonzalez* should have filed a separate motion to stay voluntary departure. Such a vague reference to unspecified "procedures" relating to an entirely different question could not possibly have put petitioners here on notice that the court would refuse to regard a *timely* motion to stay removal as also requesting a stay of voluntary departure.

In fact, pre-IIRIRA case law from the Second Circuit implied that a petition for review *did* trigger an automatic stay

---

conclusion that a motion to stay deportation necessarily includes a motion to stay voluntary departure. See *Desta*, 365 F.3d at 749 (noting that the case did not involve "ineffective assistance of counsel" because "[b]ased on the prior state of the law, Desta (and his counsel) would have been justified in thinking that the period of voluntary departure would be automatically stayed"); *Rife*, 374 F.3d at 616 (noting that approving a stay was "particularly appropriate in this case" because "past practice" may have given the petitioners "reason to believe that the stay of removal included a stay of their voluntary departure period as well"). Neither of these case-specific observations was relevant to either court's underlying reasoning for its broad holding regarding the significance of a motion to stay removal.

of both deportation and voluntary departure, just as in the Eighth and Ninth Circuits. See *Foti v. INS*, 308 F.2d 779, 784 (2d Cir. 1962) (noting that "[a]fter an automatic stay and ultimate adverse decision by [the court]," a deportee still has the option to depart voluntarily). As a matter of plain statutory law, moreover, "[u]nlike motions to stay removal, which [are] explicitly required by IIRIRA, [there is] no such provision for requiring an affirmative request to stay voluntary departure." *Desta*, 365 F.3d at 749. Thus no underlying facts or characteristics of any of the First, Second, Sixth, Seventh, Eighth, or Ninth Circuits' holdings distinguish one from the others, except the legal conclusions they reach. This Court should grant review to resolve this manifest conflict of authority.

B. The Capriciousness In The Administration Of National Immigration Laws Resulting From The Split At Issue Here Should Not Be Tolerated.

1. The practical result of the divergent views among the lower courts with respect to the question presented is that aliens like petitioners will be expelled from the country in some circuits and granted permanent lawful residence in others. Here, for example, if petitioners had been able to file their appeal and stay requests in the Sixth, Eighth, or Ninth Circuit, the court would have construed the stay of removal as a concurrent stay of voluntary departure. As a result, petitioners would still have been eligible for administrative relief when they moved the BIA to reopen their case, and they would now be lawful permanent residents pursuant to their daughter's immediate relative petition. Instead, petitioners had the misfortune of petitioning for review in the Second Circuit. See 8 U.S.C. § 1252(b)(2). On the basis of no more than their location, petitioners now face the "harsh measure" of deportation. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 459 (1987).

This sort of outcome is not uncommon. The petitioners in *Alimi*, for example, faced precisely the same situation. If they

had been able to file for review in the Sixth, Eighth, or Ninth Circuits and been granted a stay of removal, "today [they] would be lawful permanent residents" based on their family member's "application[s] for immediate-family visas." *Alimi*, 391 F.3d at 892. Instead, the Alimis were adjudicated removable because they filed their petition for review in the Seventh Circuit.

Aliens without ongoing proceedings before the BIA are also receiving drastically disparate treatment because of the conflict at issue in this case. Already at least three other petitioners in the Second Circuit have faced the harsh consequences of the holding below. See *Tedjo* v. *Gonzales*, 214 Fed. App'x. 69, 73 (2d Cir. 2007) (holding that petitioner "waived [voluntary departure] by failing to file a [separate] motion for a stay of the voluntary departure order" (citing the instant case)); *Hayat* v. *Gonzales*, 205 Fed. App'x. 904 (2d Cir. 2006) (same); *Xiao Feng Huang* v. *INS*, 204 Fed. App'x. 99 (2d Cir. 2006) (same). These aliens are now liable for a $5,000 fine and are ineligible for administrative relief for the next decade. 8 U.S.C. § 1229c(d). They also have been or will be forcibly removed (see 8 C.F.R. § 1241.1(f)) and are now ineligible for readmission under any circumstance to the United States for the next ten years. See 8 U.S.C. § 1182(a)(9)(A)(ii). But if any of these aliens had instead been located in the Sixth, Eighth, or Ninth Circuits, they would have been permitted to depart voluntarily for a destination of their choosing. 8 C.F.R. § 1240.26. They also would have been able to seek reentry to the United States or to obtain administrative relief immediately.

2. While any conflict among the courts of appeals on a matter of federal law or procedure is a matter for concern, certiorari review is particularly appropriate where a split of authority results in such disparate outcomes in the administration of the nation's immigration laws. The Constitution requires Congress to implement a "uniform rule of naturalization." U.S. Const. Art. I, § 8, cl. 4; see also *Graham* v.

Richardson, 403 U.S. 365, 382 (1971) (acknowledging that the Naturalization Clause imposes an "explicit constitutional requirement of uniformity" in the execution of "laws on the subject of citizenship"); *Henderson* v. *Mayor of New York*, 92 U.S. 259, 273 (1875) ("It is * * * clear that the matter of [immigration laws] ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco."); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 537 (2001) (arguing that the Constitution permits "exercise[] [of the immigration power] only in a manner that is geographically consistent across the nation"). The divergence in the lower courts' resolution of the question presented here is plainly generating drastic variation in the administration of the Nation's immigration laws. In such circumstances, this Court's intervention is warranted.

II. THIS CASE PRESENTS AN ISSUE OF GREAT PRACTICAL IMPORTANCE.

This lack of uniformity involves a matter of substantial importance, and the resolution of the question presented will have systematic consequences for the administration of the national immigration system. See *Kenyeres*, 538 U.S. at 1305 (noting the "significant nature" of a circuit split over the standard for granting a judicial stay of deportation). The conflict among the lower courts is producing substantial disparities in the treatment of aliens in a common factual circumstance that arises with great frequency.

1. The factual scenario that underlies the dispute at issue in this case occurs frequently throughout the Nation. Last year nearly 12,000 aliens commenced petitions to review orders of removal in the federal courts. See *2006 Judicial Business of the United States Courts*, tbl. B-3, *available online at* http://www.uscourts.gov/judbus2006/completejudicialbusine

ss.pdf. Almost half of those cases (5,862) were filed in the Ninth Circuit; more than one fifth (2,640) were filed in the Second Circuit. *Ibid.* As we have noted, approximately 10% of all removal orders in 2006 (over 22,000) permitted voluntarily departure. See U.S. Department of Justice, Executive Office of Immigration Review, *FY 2006 Statistical Year Book*, tbl. 14 (Feb. 2007), *available online at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. On the whole in 2006, the federal courts of appeals considered more than 1,100 petitions to review removal orders that included voluntary departure. *Ibid.* The issue presented here could arise in all such cases. *Cf. Desta*, 365 F.3d at 749 (noting that if it had not decided that a stay of removal also stays voluntary departure, "*hundreds* of aliens [would be] unable to take advantage of the voluntary departure that had been granted by the IJ and BIA" (emphasis added)).

This prospect is not theoretical. Under the rule announced in *Desta*, for example, the Ninth Circuit regularly stays voluntary departure without an express motion. See, *e.g.*, *Flores* v. *Gonzales*, No. 07-71291, 2007 WL 2162693 (9th Cir. July 27, 2007) (applying *Desta* to grant a stay of voluntary departure upon a single motion to stay removal); *Cardenas* v. *Gonzales*, No. 07-71090, 2007 WL 2162668 (9th Cir. July 27, 2007) (same); *Garcia* v. *Gonzales*, No. 07-70728, 2007 WL 2162639 (9th Cir. July 27, 2007) (same); *Neri* v. *Gonzales*, No. 07-70571, 2007 WL 2162484 (9th Cir. July 27, 2007) (same); *Romero* v. *Gonzales*, No. 04-71296, 2007 WL 2161640 (9th Cir. July 27, 2007) (same); *Larios* v. *Gonzales*, No. 07-70447, 2007 WL 2162364 (9th Cir. July 27, 2007) (same).

Even in the Second Circuit, where aliens are now directed to file separate motions, many petitioners will face severe prejudice without ever having had an opportunity (however chimerical) to act on the rule promulgated below. Aliens who filed for review prior to resolution of the instant case cannot now seek to comply with the Second Circuit's requirement

that they file a separate motion to stay voluntary departure. Here, for instance, petitioners filed for review on December 26 and 27, 2002. Their case was not finally resolved until May 24, 2007, more than four years later. Such protracted litigation is not uncommon in the immigration context, where resolution of petitions to review removal orders often takes as long as three or four years. See, *e.g.*, *Romero* v. *Gonzales*, No. 04-71296, 2007 WL 2161640 (9th Cir. July 27, 2007) (petition filed Mar. 22, 2004, over three years before the disposition of the petition); *Xiao Feng Huang* v. *INS*, 204 Fed. App'x. 99 (2d Cir. 2006) (petition filed Mar. 3, 2003, over three years before the disposition of the petition). Review by this Court is warranted where, as here, "a considerable number of suits are pending in the lower courts which will turn on resolution of * * * [the] conflict among the circuits as to [the question presented]." *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 237 (1964).

2. Moreover, resolution of the question presented is important "for both substantive and procedural reasons." *Alimi*, 391 F.3d at 892. Courts on each side of the dispute in this case agree that the question presented here has significant implications both for enforcement of federal immigration law and for sound judicial management.

The Sixth, Eighth and Ninth Circuits have expressed concern that the approach taken by the First, Second, and Seventh Circuits will undermine the goals of voluntary departure. If petitioners are required to depart "while they petition for review * * * they may not be able to return to this country even if they are eventually successful on the merits of their petitions"—since, "[b]y definition, aliens seeking asylum contend that they are subject to persecution when they return to their own countries, where they risk further harm, potentially including imprisonment or even death." *Desta*, 365 F.3d at 748. The Sixth, Eighth, and Ninth Circuits accordingly have found that it "serves the purposes of our asylum law, as well as the interests of justice, to construe motions to

stay removal as including motions to stay voluntary departure." *Ibid.* The First, Second, and Seventh Circuits, by contrast, premised their holdings on a different understanding of federal immigration law and policy, reasoning that voluntary departure is intended to "provide[] an incentive to depart without dragging out the process and without requiring the agency and courts to devote resources to the matter." *Alimi*, 391 F.3d at 892. These courts also have opined that the government and courts will be placed at a disadvantage if aliens do not *expressly* seek a stay of voluntary departure because those responding to the stay application may not be aware that this relief is being sought.

We believe that the Sixth, Eighth, and Ninth Circuits have the better of this argument. One way or the other, however, resolution of this conflict is necessary to best achieve the goals of the federal voluntary departure program and to achieve proper balance in the resolution of stay applications.

III. THE SECOND CIRCUIT'S DECISION IS WRONG.

The significance of the conflict in the courts of appeals itself warrants review of the decision below by this Court. It should be added, however, that the decision below is incorrect. It (1) ignores the reality that voluntary departure and deportation are different facets of a single order, (2) will inhibit finality in immigration proceedings and generate substantial additional work for an already strained court system, and (3) is inconsistent with this Court's precedent.

A. Because Voluntary Departure And Removal Are Complementary Facets Of The Same Administrative Order, There Is No Point To Requiring An Individual Statement Of The Desire To Stay Both.

There is no practical reason from any standpoint to require differentiating an alien's motion to stay removal from his or her motion to stay voluntary departure. From an alien's point of view, there would never be any reason to distinguish the requests, because any alien who is granted voluntary de-

parture and seeks to stay removal pending judicial review will *inevitably* want also to stay voluntary departure.

Nor could there be any point in distinguishing motions to stay voluntary departure and removal from a reviewing court's point of view. As the First Circuit itself has recognized, voluntary departure and removal are complimentary facets of the same administrative order. See *Bocova*, 412 F.3d at 267 ("[O]rders of removal and grants of voluntary departure are entered as alternate orders that comprise different facets of a single ukase." (citing 8 C.F.R. § 1240.26(d)). See also *Desta*, 365 F.3d at 748 (describing "[a] motion to stay voluntary departure [as] 'ancillary' to a motion to stay removal"); *Macotaj*, 424 F.3d at 467 (same); *Rife*, 374 F.3d at 616 (describing voluntary departure as "complement[ary]" and "ancillary" to removal). As a consequence, there is every reason for a court to expect that a stay of one would stay the other.

Agencies involved in administering the immigration system also treat voluntary departure and removal as integrated. When an immigration judge issues an order for voluntary departure, he or she includes an "alternate order [of] removal." 8 C.F.R. § 1240.26(d). And when "an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, [the removal order] shall become final [only] * * * upon overstay of any voluntary departure period * * *." 8 C.F.R. § 1241.1(f). The Department of Justice therefore acknowledges that "[v]oluntary departure is considered a form of removal." U.S. Department of Justice, Executive Office of Immigration Review, *supra*, at Q1. A motion to stay removal filed during the period for voluntary departure is therefore *directed at the voluntary departure order*—which is, at the time, the only order that operates upon the alien. Concluding that a motion to stay the order of removal also includes a motion to stay the period of voluntary departure therefore finds logical support in the relevant statutes

and regulations; the object of the motion to stay is, at the time of filing, actually the order to depart voluntarily.

A contrary conclusion, moreover, rests on an absurd premise. If a motion to stay removal is thought not also to seek a stay of voluntary departure, the court must believe that an alien who does not file a separate motion to stay voluntary departure is either (a) electing to suffer the substantial "penalties attached to forfeiting a grant of voluntary departure: a considerable fine and a 10-year prohibition on 'any further relief under this section and sections 240A, 245, 248, and 249,'" even if the appeal ultimately is successful (*Desta*, 365 F.3d at 746-47 (quoting *Zazueta-Carrillo* v. *Ashcroft*, 322 F.3d 1166, 1177 (9th Cir. 2003) (Berzon, J., concurring))); or (b) planning to depart while his or her litigation to gain the right to remain in the country is pending, even though "'[a]n alien's departure in these circumstances could in effect void the asylum appeal, because the alien might not be able to return to the United States if he or she successfully petitioned for relief through judicial review.'" *Ibid.* (quoting the same). It is inconceivable that any alien would make either such choice.[6]

---

[6] Requiring an alien to depart to avoid the imposition of penalties during the pendency of an appeal is particularly troubling given the high error rate within the immigration system. Judge Posner noted in a recent opinion that the Seventh Circuit had "reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review * * * on the merits" over the prior year. *Benslimane* v. *Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). He concluded that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." *Id.* at 830. Similar judicial criticism of immigration adjudications is voluminous. For a small sampling, see *Ssali* v. *Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Sosnovskaia* v. *Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) ("[T]he procedure that the [immigration judge] employed in this case is an affront to [petitioner's]

In rejecting petitioners' argument, the court below, as well as the circuits with which it agreed, relied largely on the rationale that "the Government deserves prompt notice of precisely what relief a petitioner seeks" because stays of removal and voluntary departure seek different types of relief and "the equities involved in the two types of stays may also differ." App., *infra*, 18a & n.8. See *Bocova*, 412 F.3d at 267; *Alimi*, 391 F.3 at 892. But given the reality that no rational alien would seek to stay removal but not voluntary departure, there can be no serious prospect of confusion about the alien's request on the part of the government or the court. As the Sixth Circuit put it: "It is, of course, important that courts understand what relief litigants are seeking. At the same time, the possibility of misunderstanding in this immigration setting strikes us as minimal." *Macotaj*, 424 F.3d at 467 n.1. Nor, for that matter, has any court offered an explanation of how or illustration of when the equities might balance differently as to a stay of removal on the one hand and a stay of voluntary departure on the other. The distinction identified by the court below therefore is wholly illusory.[7]

---

right to be heard."); *Wang* v. *Attorney General*, 423 F.3d 260, 269 (3d Cir. 2005) ("[T]he tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding."); *Fiadjoe* v. *Attorney General*, 411 F.3d 135, 154-55 (3d Cir. 2005) (finding that the immigration judge's "hostile" and "extraordinarily abusive" conduct toward the petitioner "by itself would require a rejection of his credibility finding"); *Lopez-Umanzor* v. *Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) ("[T]he [immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture."); *Korytnyuk* v. *Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the [immigration judge's] conclusion, not [petitioner's] testimony, that strains credulity.") (quotations omitted).

[7] Judge Easterbrook's opinion for the Seventh Circuit in *Alimi* also reasoned that "[t]he United States offers benefits for *voluntary* de-

B. The Availability Of An Ineffective Assistance Of Counsel Claim Means That The Second Circuit's Rule Adds Great Inefficiency To the Resolution Of Immigration Cases.

In addition to ignoring the nature of orders of deportation and removal, the Second Circuit's rule actually will increase the burden on courts by leading aliens to pursue claims for ineffective assistance of counsel. Such claims are available in immigration proceedings, as the Second Circuit itself has recognized. See, *e.g.*, *Iavorski* v. *INS*, 232 F.3d 124, 128 (2d Cir. 2000). When an alien has representation, the attorney must provide competent counsel. *Ibid.* The Second Circuit has further noted that "[i]neffective assistance of counsel in * * * a deportation case occurs when * * * * '(1) competent counsel would have acted otherwise,' and (2) '[the alien] was prejudiced by [ ] counsel's performance.'" *Id.* at 128-29 (citations omitted). Surely under the rule promulgated below in this case, competent counsel will file a motion to stay voluntary departure; if they do not, the alien will be prejudiced. See *Desta*, 365 F.3d 748 ("By failing to protect an alien's ability to depart voluntarily, an attorney would be severely prejudicing his client.")

The availability of an ineffective assistance of counsel claim will increase the court's work load in cases like this

---

parture; an alien cannot resist to the bitter end and still claim those benefits." 391 F.3d at 892 (emphasis in original). This rationale, however, would seem to be an argument for not allowing stay of voluntary departure *at all*; if such stays are permissible, the Seventh Circuit's view provides no basis for differentiating stays of removal and of voluntary departure. In any event, as the Sixth Circuit observed, "it hardly seems unfair to allow a petitioner to seek judicial review of a possibly erroneous administrative decision and still take advantage of a benefit that was granted by the immigration judge (the right of voluntary departure) and actually renewed by the BIA on the petitioner's appeal to the agency." *Macotaj*, 424 F.3d at 467 n.1.

one: courts will have to adjudicate such claims if and when counsel fail to file a separate motion to stay voluntary departure. See, *e.g.*, *Iavorski*, 232 F.3d at 127; see also *Qeraxhiu* v. *Gonzales*, 206 Fed. App'x. 476 (6th Cir. 2006) (petitioner filed a motion to reopen before the BIA claiming ineffective assistance of counsel; subsequently filed a petition for review of the BIA decision denying the motion). In response to the rule adopted by the Second Circuit in this case, numerous such claims may be filed each year. See *Desta*, 365 F.3d at 749 (noting that if it had not decided that a stay of deportation also stays voluntary departure, "hundreds of aliens" would be prejudiced each year).

In addition, the availability of an ineffective assistance claim provides an end-run around the Second Circuit's resolution of the question presented here. The Second Circuit has previously held that where an alien is prejudiced by ineffective assistance of counsel in an immigration case, the court will equitably toll the filing deadline for a motion, rendering the omitted motion timely filed. *Iavorski*, 232 F.3d at 127 (equitably tolling to time to file a motion to reopen on the basis of ineffective assistance). If successful in their ineffective assistance claim, then, aliens whose counsel fail expressly to seek a stay of voluntary departure could ultimately obtain the same relief as is now available in the Sixth, Eighth, and Ninth Circuits—but only after substantial additional litigation. The rule promulgated below therefore threatens to load the courts' dockets with substantial additional work, possibly for no practical benefit at all.

C. The Decision Below Offends This Court's Command To Resolve Ambiguities In Favor Of Aliens.

Finally, the Second Circuit's holding plainly resolves the ambiguity at issue in this case against aliens, departing from this Court's "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). See,

e.g., *Barroso* v. *Gonzales*, 429 F.3d 1195, 1204-05 (9th Cir. 2005) (concluding that a "timely filing of a motion to reopen or reconsider [before the BIA] automatically tolls the voluntary departure period" on the ground that it accords with the "'principle of construing any lingering ambiguities in deportation statutes in favor of the alien'" (quoting *St. Cyr*, 533 U.S. at 320 (quoting *Cardoza-Fonseca*, 480 U.S. at 449))).

The rule that courts must construe ambiguities in favor of aliens is based on the recognition that imposing a "forfeiture [of] residence in this country" is a "drastic measure and at times equivalent to banishment of exile." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). See also *Cardoza-Fonseca*, 480 U.S. at 449 (describing removal as "always a harsh measure"). Although stricter readings of immigration rules "might find support in logic," courts should "not assume that Congress meant to trench on [aliens'] freedom beyond that which is required by the narrowest" understanding of the law. *Ibid*; see also *INS* v. *Errico*, 385 U.S. 214, 225 (1966) (same); *Costello* v. *INS*, 376 U.S. 120, 128 (1964) (same). Here, although no express statutory or regulatory provision dictated its result, the Second Circuit applied a rule that causes aliens "substantial prejudice * * * through no fault of their own." *Desta*, 365 F.3d at 749. In contrast, the approach taken by the Sixth, Eighth, and Ninth Circuits resolves the ambiguity in the aliens' favor, while also causing only "incidental [and "relatively minimal"] prejudice * * * to the government." *Ibid.* The court below erred when it rejected the holdings of those courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

IRINA KOGAN
2612 Avenue Y
Brooklyn, NY 11235
(718) 621-5970

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

AUGUST 2007

APPENDIX

APPENDIX A

United States Court of Appeals,
Second Circuit.

Vladimir IOURI and Vera Yuriy,
Petitioners,
v.
John ASHCROFT, Attorney General of the United States,
Respondent.

Docket Nos. 02-4992(L), 02-4998 (CON),
03-40132 (CON), 03-40134 (CON).

Argued: March 22, 2005.
Decided: Sept. 11, 2006.
Amended: Sept. 13, 2006.
On Petition for Rehearing: Decided May 24, 2007.
Amended: May 24, 2007.

Before: SOTOMAYOR, RAGGI, and HALL, Circuit Judges.

On consideration of the petition for rehearing, the opinion issued on September 11, 2006, is modified in order to clarify that, following the repeal of IIRIRA's transitional rules, our court no longer lacks jurisdiction to review petitions for stays of deportation. For ease of reference, a fully revised opinion shall issue this date.

1. We delete the following sentences of the opinion found at 464 F.3d at 178-79:

> Petitioners here, however, are subject to the transitional rule of IIRIRA because deportation proceedings against them commenced prior to April 1, 1997, and a final deportation order was entered after Octo-

ber 30, 1996. Pub.L. No. 104-208, § 309(c)(4), 110 Stat. 3009, 3009-546, 3009-625. Two changes made applicable by the transitional rules are relevant here.

In place of those deleted sentences, we insert the following:

Petitioners here, however, are subject to the rule of IIRIRA, as amended by the REAL ID Act of 2005, because a final deportation order was entered after October 30, 1996. Pub.L. No. 104-208, § 309(c)(4), 110 Stat. 3009, 3009-546, 3009-625; REAL ID Act of 2005, Pub.L. 109-13, § 106(d), 119 Stat. 231, 311. Two changes made applicable by IIRIRA are relevant here.

2. In the opinion at 464 F.3d at 179, we delete the phrase "-a permanent rules case-."

3. We delete the following sentences of the opinion found at *Iouri v. Ashcroft*, 464 F.3d 172, 180 (2d Cir.2006):

Such stays are particularly important in cases governed by IIRIRA's transitional rules because removal of an alien strips this Court of jurisdiction to hear their petition for review. *See Elian*, 370 F.3d at 900. Thus, if we deny a stay of deportation, we deprive ourselves of the opportunity to review a claim, and as a result, we may end up returning an alien to the very persecution he or she was fleeing in the first place.

4. We modify footnote 8, 464 F.3d at 180, to read as follows:

Under IIRIRA's transitional rules, the relief sought by stays of deportation was particularly significant because removal of an alien under those rules stripped this Court of jurisdiction to hear their petition for review. See *Elian*, 370 F.3d at 900. During

the course of this appeal, Congress repealed the IIRIRA transitional rules, reestablishing our jurisdiction to hear the appeals of aliens in spite of their departure. *See Obale v. Att'y Gen.*, 453 F.3d 151, 160 n. 9 (3d Cir.2006) ("Congress enacted 8 U.S.C. § 1252(b)(3)(B) in order to permit judicial review of a removal order even if the alien has departed the United States."). This enactment did not, however, render a stay of deportation and a stay of voluntary departure functionally the same. Notwithstanding the repeal of the IIRIRA transitional rules, these two forms of relief continue to differ in both their practical and equitable respects. Consequently, the Government deserves prompt notice of precisely what relief a petitioner seeks. Indeed, providing such notice is a petitioner's responsibility. Under Federal Rule of Appellate Procedure 18, which governs stays pending review of an agency decision, a motion for a stay must include "the reasons for granting the relief requested and the facts relied on." Fed. R.App. P. 18(a)(2)(B)(i). In this case, Petitioners styled their motion as a "stay of deportation" and, in support, noted that because stays are no longer automatically issued they are "subject to being physically deported from the United States at any time" and that a "denial of a Stay of Deportation will allow the INS to act to deport them and render [the] Petition for Review moot." It is clear, then, that the reasons offered by Petitioners for granting their stay were aimed at halting their deportation rather than extending their period for voluntary departure. Petitioners thus failed to give appropriate notice that they sought relief in the form of a stay of voluntary departure. As a result, they are now not entitled to that relief. *See Thapa*, 460 F.3d at 336-37 (stating that the equities relevant to a stay of a voluntary departure order and a stay of an order of

removal may balance differently and concluding that granting Thapa's motion for a stay of the voluntary departure order did not necessitate granting his motion for a stay of the order of removal).

5. We delete the following sentence of the opinion found at 464 F.3d at 181: "Whereas a stay of deportation is aimed at preserving the court's jurisdiction, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded." In its place, we insert: "Whereas a stay of deportation is aimed at preventing forcible removal, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded."

6. Finally, we delete footnote 9, found at 464 F.3d at 181.

The petition for rehearing is **DENIED**.

HALL, Circuit Judge.

Vladimir Iouri and Vera Yuriy ("Petitioners"), natives of the former Soviet Union and citizens of the now independent Ukraine, petition for review from a November 27, 2002 decision of the Board of Immigration Appeals ("BIA") summarily affirming an Immigration Judge's ("IJ") order finding Petitioners incredible and denying their application for asylum, withholding of return, and relief under the Convention Against Torture ("CAT"). Petitioners also seek review of a May 29, 2003 order of the BIA denying their motion to reopen immigration proceedings. The purpose of the motion to reopen was to adjust their status to that of lawful permanent residents on the basis of approved "immediate relative" petitions filed on Petitioners' behalf by their daughter, a United

States citizen. The BIA denied the motion because by the time it was filed, Petitioners had remained in the United States beyond the period granted for voluntary departure and were, therefore, statutorily barred from seeking adjustment of status.

On petition for review, Petitioners raise two issues. First, whether the BIA erred by failing to take into account their advanced age in assessing their credibility. Second, whether their voluntary departure period should be deemed stayed, tolled, or otherwise extended by their having timely filed for a petition for review and moved for a stay of deportation in their underlying asylum case.

I. Background

Petitioners-husband and wife-are natives of the former Soviet Union and citizens of the now independent Ukraine. Iouri entered the United States on or about April 4, 1993 as a non-immigrant visitor. Yuriy followed on or about August 3, 1993, also as a non-immigrant visitor. Soon after his wife's arrival, Iouri sought asylum claiming that as a member of the Ukraine Orthodox Church, he was persecuted and has a well-founded fear of future persecution due to his religious beliefs and affiliation.[1]

In his asylum application, Iouri claims that he has long been mistreated due to his religious beliefs. In particular, he asserts that under Communist rule, his family was unable to practice their religion openly, and as a child, he was punished in school for attending Easter services. His application also recounts alleged mistreatment while he served in the army. In Hungary, for example, Iouri asserts he refused to shoot protestors due to his moral and religious convictions, and as a result, he was mistreated and threatened with punishment. Iouri claims his commanding officer arrested him while he

---

[1] Yuriy is claimed as a dependent.

was praying.[2] Beyond that, Iouri contends he was generally mocked, threatened, and forced to serve in an "atmosphere of general hostility."

According to Petitioners, conditions did not improve with *perestroika* and independence. They report receiving threatening letters and phone calls; letters they sent were opened and inspected; and the Russian Orthodox and Ukranian Catholic churches, backed by the government, did "their best to declare [Petitioner's] religion out-of-law."

Iouri's asylum application, however, made no mention of any specific incidents of abuse or violence against him or his wife. Indeed, Iouri mentioned specific incidents for the first time during an asylum interview and in an addendum to his application submitted to the IJ in June 1999. In the addendum, Iouri claimed that (1) he was attacked in December of 1991 and threatened with death if he did not stop attending religious services; (2) his apartment was vandalized in March of 1992; and (3) in February of 1993, his apartment was again broken into and vandalized, and he was beaten and admitted to the hospital with a ruptured kidney.

A hearing was held on July 6, 2000 at which both Petitioners testified. With regard to the 1991 incident, Iouri claimed for the first time that he was knocked unconscious, suffered injuries to his head and chest, and was hospitalized for seven days. As to the 1992 vandalism incident, he testified that graffiti with death threats was painted on the wall, and when he attempted to report the incident, police informed him the case was closed and advised him to stop practicing his religion. When Yuriy testified, she could not remember the date of the third incident, stating that it occurred either in

---

[2] After leaving the army, Iouri claims he studied to be a merchant mariner but was unable to get a job because he refused to fight in Hungary. He states that he eventually found a job in a toy factory where he met his wife. He alleges that the KGB warned his managers about his and his wife's "political unreliability."

December of 1992 or February of 1993. She also testified that her husband was attacked on the street, not in the apartment. When brought to her attention that submitted documents indicated the attack occurred in her home, she changed her testimony and stated that a fourth incident in which her husband was beaten occurred sometime in December of 1992. Her husband, however, did not testify to that effect, and there is no mention in any of the documents of a December 1992 attack.

The IJ denied Petitioners' application finding that Iouri's testimony was not credible. Specifically, the IJ found his testimony to be "generally halting and vague with regards to some significant events." As to the 1991 incident, the IJ noted that this had not been mentioned anywhere else and there were no documents corroborating that he had been hospitalized. The IJ also noted inconsistencies in the testimony between Iouri and his wife-i.e., she claimed he was attacked in 1993 on the street, not in the apartment, and she testified to a fourth incident never once mentioned by Iouri. Finally, the IJ explained that Iouri was vague in describing the tenets of his faith.[3]

Although the IJ denied Petitioners' application for asylum, he granted their request to voluntarily depart pursuant to former Immigration and Nationality Act ("INA") § 244(e)(1), 8 U.S.C. § 1254(e) (repealed 1996). Petitioners were warned that if they failed to depart voluntarily, the order granting voluntary departure would be withdrawn and they would be ordered deported to the Ukraine. They were also warned, by written order, of the statutory consequences of failing to depart; specifically, they would be ineligible for certain immi-

---

[3] In this regard, the IJ noted that Petitioners submitted a letter in support of their asylum application from a rector at a Russian Orthodox Church that Petitioners attend in the United States which, according to other materials is, in fact, the church that caused them problems in the Ukraine.

gration relief, including adjustment of status, for a term of five years. *Id.* §§ 1252b(e)(2) & (5). Petitioners filed a timely appeal which tolled the first thirty days of their voluntary departure period. On November 27, 2002, the BIA summarily affirmed the IJ's decision and granted Petitioners a new period of voluntary departure lasting until December 27, 2002.

Petitioners filed their petitions for review with this court on December 26, 2002 and December 27, 2002. Along with the petitions for review, Petitioners also requested that we grant them a stay of deportation. They did not, however, specifically request a stay of their voluntary departure period or seek an extension of the departure period from the Immigration and Naturalization Service's ("INS") District Director. Nor did they depart. Instead, they filed a motion before the BIA to reopen proceedings in order to apply for adjustment of status on the basis of approved "immediate relative" petitions filed on their behalf by their daughter, now a United States citizen. The BIA denied their motion because they had overstayed their departure period and were, therefore, statutorily barred from applying for adjustment of status. This appeal followed.

II. Discussion

A. Asylum Application

Because the BIA summarily affirmed the IJ's decision to deny Petitioners' application for asylum, we review the IJ's decision directly. *Twum v. INS,* 411 F.3d 54, 58 (2d Cir.2005). In turn, our scope of review is "exceedingly narrow." *Wu Biao Chen v. INS,* 344 F.3d 272, 275 (2d Cir.2003) (internal quotation marks omitted). In reviewing a denial of an application for asylum, we "defer to the immigration court's factual findings as long as they are supported by 'substantial evidence,'" and "we will not disturb a factual finding if it is supported by 'reasonable, substantial and probative' evidence in the record when considered as a whole." *Id.* (quoting *Diallo v. INS,* 232 F.3d 279, 287 (2d Cir.2000)).

Factual findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

When it comes to credibility determinations, we afford "particular deference" to the IJ in applying the substantial evidence test. *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 (2d Cir.2004) (internal quotation marks omitted). Thus, we look to see whether the IJ has provided "specific, cogent" reasons for her findings and whether those findings bear a "legitimate nexus" to the credibility determinations. *Id.* at 74 (internal quotation marks omitted). Where a credibility determination is based on specific examples of "inconsistent statements" or "contradictory evidence," a "reviewing court will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise." *Id.* (internal quotation marks omitted).

Here, the IJ clearly set forth specific and cogent reasons for his adverse credibility finding, stating:

> Again, for all the reasons: the internal discrepancies, the external inconsistencies with information on documents and the addendum to the I-589 request for asylum, the general vagueness of the testimony, the lack of key details and specifics with regard to the most critical portions of the claim, and the significant discrepancies between the testimony of the two respondents; for all these reasons, I find that the testimony does not rise to the level of believability and consistency in detail to provide us with a plausible and coherent account of the basis for the fear, and for that reason a negative credibility finding is made for each respondent.

Tr. 14-15.

These findings are supported by substantial evidence. As noted above, there were significant discrepancies between Iouri's initial asylum application, the addendum, and his tes-

timony. For example, the addendum did not note his hospitalization following the first incident and nowhere in the initial asylum application did he mention any of these incidents. More telling are the discrepancies between the testimony of the two Petitioners. Not only did Yuriy testify that the February 1993 incident occurred while her husband was on the street, whereas he testified that it occurred in the couple's home, a fact his spouse would be unlikely to mistake, but she also testified to a fourth incident occurring in December of 1992 which is mentioned nowhere in her husband's testimony, the supporting asylum application, or even the addendum. These inconsistencies are sufficient to support the IJ's adverse credibility findings. *See Gao v. U.S. Atty. Gen.*, 400 F.3d 963, 964 (2d Cir.2005) (holding adverse credibility supported by substantial evidence where "numerous discrepancies as to dates and surrounding details [and petitioner's] testimony at his asylum hearing differed substantially from his initial written asylum application and first asylum interview . . .").

Nevertheless, Petitioners argue that the IJ and BIA should have considered the passage of time and their advanced age in assessing their credibility. As the government correctly points out and as Petitioners acknowledge, however, this particular argument was not raised before the BIA and Petitioners therefore failed to exhaust their administrative remedies. Accordingly, this argument has been waived. *See Foster v. INS*, 376 F.3d 75, 78 (2d Cir.2004) ("To preserve a claim, we require '[p]etitioner to raise *issues* to the BIA in order to preserve them for judicial review.'" (quoting *Cervantes-Ascencio v. INS*, 326 F.3d 83, 87 (2d Cir.2003))).[4] We there-

---

[4] Even if we did consider Petitioners' argument, it is without merit. Neither the passage of time nor Petitioners' advanced age adequately explains the inconsistencies here. With the passage of time and age, one expects memory to fade. Details such as dates may be forgotten or inaccurately recalled, but here Iouri totally

fore deny the petitions for review of the underlying asylum application and petition for withholding of return.[5]

B. Voluntary Departure

As noted, Petitioners were granted-both by the IJ and the BIA-discretionary relief of voluntary departure in lieu of deportation pursuant to former INA § 244(e)(1).[6] "If adhered to, voluntary departure produces a win-win situation." *Bocova v. Gonzales*, 412 F.3d 257, 265 (1st Cir.2005). "For aliens, voluntary departure is desirable because it allows them to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, to avoid stigma and various penalties associated with forced removals . . . and it facilitates the possibility of return to the United States . . . ." *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir.2004). For the government, it expedites departures and reduces the costs that are typically associated with deporting individuals from the United States. *See*

---

failed to mention in his initial asylum application-an application filed shortly after his arrival in the United States-several grave incidents which go to the heart of his claim. It was more than five years later that he mentioned them, first in the addendum and then while testifying before the IJ. Similarly, his wife testified to an incident never before mentioned. The severity of these incidents, coupled with the fact that they were not mentioned until sometime later, suggests this is more than a case of mere forgetfulness due to either age or passage of time. Accordingly, the IJ cannot be faulted for failing to excuse the inconsistencies or improved recollections on these grounds.

[5] Petitioners have not sought review of their CAT claim.

[6] Section 244(e)(1) provides that "the Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish . . . that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure . . . ." 8 U.S.C. § 1254(e)(1).

Thapa v. Gonzales, 460 F.3d 323, 328 (2d Cir.2006) *Azarte v. Ashcroft*, 394 F.3d 1278, 1284 (9th Cir.2005).

Following the BIA's decision to affirm the IJ, Petitioners were required to depart the United States by December 27, 2002. They did not. Instead, on January 23, 2003, they moved before the BIA to have their proceedings reopened in order to adjust their status based on "immediate relative" petitions filed on Petitioners' behalf by their daughter and approved by the INS on November 25, 2002. Because they had overstayed their time for voluntary departure, however, the BIA denied the motion. *See* 8 U.S.C. § 1252b(e)(2)(A) (repealed 1996) (aliens who fail to depart within the period for voluntary departure, "other than because of exceptional circumstances, shall not be eligible for [adjustment or change of status under section 245] for a period of 5 years after the scheduled date of departure . . . .").

The BIA's conclusions of law are reviewed *de novo* but where the BIA has applied the correct law, we review its decision to deny reopening for abuse of discretion. *Guan v. BIA*, 345 F.3d 47, 48 (2d Cir.2003). To get around the otherwise clear statutory bar to their seeking adjustment of status, Petitioners contend that either (1) their period for voluntary departure does not commence until this Court issues the mandate in the underlying asylum case or (2) because they sought a stay of deportation, we should enter a *nunc pro tunc* order staying their voluntary departure period. Either way, Petitioners argue the BIA erred in not granting their motion to reopen.

i. When does Petitioners' time to depart voluntarily begin to run?

Citing the Ninth Circuit's decision in *Contreras-Aragon v. INS*, 852 F.2d 1088, 1092 (9th Cir.1988), Petitioners first argue that their period for voluntary departure does not begin to run until we issue a mandate denying their petition for review in their underlying asylum case. *Contreras-Aragon*,

however, is an "old law" case. At the time of *Contreras-Aragon*, the INA provided for automatic stays of deportation upon the filing of a petition for review. 8 U.S.C. § 1105a(a)(3) (repealed 1996). The *Contreras-Aragon* court reasoned that it was inconceivable "that Congress made such provision but intended to require aliens granted voluntary departure to seek repeated extensions of the voluntary departure period from the district director, in order to preserve the award of voluntary departure until our final determination . . . ." 852 F.2d at 1092. Thus, the court concluded that the right of voluntary departure should remain in effect throughout the period of appellate review and for whatever additional time the BIA afforded the petitioner in its decision. *Id.* In adopting this rule, the court rejected an alternative rule which would have preserved voluntary departure only where the alien petitions for review within the period specified for voluntary departure. Such a rule was unacceptable because, in the court's view, it would "shorten the statutory six month period" provided for under "old law" for filing a petition for review. *Id.* at 1096 (citing 8 U.S.C. 1252(c) (repealed 1996)).

Petitioners here, however, are subject to the rule of IIRIRA, as amended by the REAL ID Act of 2005, because a final deportation order was entered after October 30, 1996. Pub.L. No. 104-208, § 309(c)(4), 110 Stat. 3009, 3009-546, 3009-625; REAL ID Act of 2005, Pub.L. 109-13, § 106(d), 119 Stat. 231, 311. Two changes made applicable by IIRIRA are relevant here. First, automatic stays are no longer granted; an alien must petition the court for a stay of deportation. *Id.* § 309(c)(4)(F). Second, petitions for review must be filed within 30 days of the final order of deportation. *Id.* § 309(c)(4)(C).

These changes have so undercut the rationale of *Contreras-Aragon* that Petitioners reliance on that decision is misplaced. Indeed, these very same changes prompted the Ninth Circuit several years later in *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166 (9th Cir.2003), to reconsider

Contreras-Aragon and hold that the period for voluntary departure begins to run from the time the BIA enters its order.[7] *Id.* at 1170-72; *see also Rife v. Ashcroft,* 374 F.3d 606, 614-15 (8th Cir.2004). Petitioners' period for voluntary departure, therefore, began to run upon issuance of the BIA's order denying their application for asylum and withholding of return. They are therefore barred from adjusting their status unless the period for voluntary departure was stayed, tolled, or otherwise extended by their having filed for a stay of deportation. We now turn to that issue.

ii. Whether the period for voluntary departure may be stayed, tolled, or otherwise extended

In *Thapa,* 460 F.3d 323, following the position adopted by the majority of the Circuits, *compare Bocova,* 412 F.3d at 265-67 (holding that IIRIRA does not limit a court's authority to issue a stay of departure suspending the running of a voluntary departure period); *and El Himri v. Ashcroft,* 344 F.3d 1261, 1262 (9th Cir.2003) ("the District Director's authority to extend voluntary departure time periods does not limit this court's equitable authority to grant a stay of the voluntary departure period"); *and Rife,* 374 F.3d at 616 (holding that since IIRIRA permits stays of removal, voluntary departure can also be stayed); *and Lopez-Chavez,* 383 F.3d at 654 (concluding that under the permanent IIRIRA rules, a stay tolling the time for voluntary departure may be

---

[7] In *Elian v. Ashcroft,* 370 F.3d 897, 901 (9th Cir.2004), however, the court held that *Contreras-Aragon* still applied to cases governed by then-applicable transitional rules under IIRIRA due to the fact that under those rules the court loses jurisdiction to hear a petition for review if the alien leaves the United States. That we are deprived of jurisdiction under these circumstances may very well be a reason why voluntary departure might appropriately be stayed, tolled, or otherwise extended. It does not, however, provide a reason for *automatically* imposing such a stay until such time as we decide the merits of the underlying petition for review.

entered); *and Nwakanma v. Ashcroft,* 352 F.3d 325, 327 (6th Cir.2003); *with Ngarurih v. Ashcroft,* 371 F.3d 182, 194 (4th Cir.2004) (holding that voluntary departure may not be stayed), we recently held that "we have the authority . . . to stay an agency order [of voluntary departure] pending . . . consideration of a petition for review on the merits." *Thapa,* 460 F.3d at 324-25. We did not address, however, our power to issue such a stay where, as here, the petitioners (1) moved only for a stay of removal and failed to make a motion expressly requesting a stay of voluntary departure, and (2) have now sought such relief well after the time for voluntary departure has expired.

iii. Whether Petitioners must have expressly requested a stay of the voluntary departure order

In *Thapa,* and most cases where other courts have held the period for voluntary departure may be stayed, the petitioner expressly moved for a stay of voluntary departure. *See id.* at 326-27; *see, e.g., Nwakanma,* 352 F.3d at 327; *Lopez-Chavez,* 383 F.3d at 651. In contrast, Petitioners here sought a stay of *deportation,* but not a stay of *voluntary departure.* That said, two circuits-the Ninth Circuit in *Desta v. Ashcroft,* 365 F.3d 741, 743 (9th Cir.2004), and the Eighth Circuit in *Rife,* 374 F.3d at 616-have held that where an alien files a motion to stay removal before the period for voluntary departure expires, such a motion should be construed as including a motion to stay the voluntary departure period. According to both courts, this is so because, a motion seeking a stay of voluntary departure is "ancillary," *Desta,* 365 F.3d at 748, or "complementary," *Rife,* 374 F.3d at 616, to a stay of deportation. We disagree. For the reasons that follow, we join the First and Seventh Circuits, both of which have held that an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay. *Bocova,* 412 F.3d at 268; *Alimi v. Ashcroft,* 391 F.3d 888, 892-93 (7th Cir.2004)

When an alien is ordered deported, a warrant by the INS District Director is issued authorizing the officer to take the alien into custody and deport him or her. Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* § 72.08[1][a] (rev. ed.2005). When this Court grants a stay of deportation, we are preventing the forced removal of an alien from the country. Such stays are particularly important in cases governed by IIRIRA's transitional rules because removal of an alien strips this Court of jurisdiction to hear their petition for review. *See Elian,* 370 F.3d at 900. Thus, if we deny a stay of deportation, we deprive ourselves of the opportunity to review a claim, and as a result, we may end up returning an alien to the very persecution he or she was fleeing in the first place.

Voluntary departure, in contrast, is a privilege granted an alien in lieu of deportation. *See Ballenilla-Gonzalez v. INS,* 546 F.2d 515, 521 (2d Cir.1976). Although it carries with it significant restrictions barring an alien's readmission to the United States, *see Thapa,* 460 F.3d at 328, voluntary departure affords an alien certain benefits: "[I]t allows [him] to choose [his] own destination points, to put [his] affairs in order without fear of being taken into custody at any time, to avoid the stigma and various penalties associated with forced removals (including extended detention while the government procures the necessary travel documents and ineligibility for readmission for a period of five or ten years, *see* 8 U.S.C. § 1182(a)(9)(A)), and it facilitates the possibility of return to the United States, for example, by adjustment of status." *Id.* An "immigration judge's order granting voluntary departure usually withholds the entry of a deportation order, permitting the respondent to depart within a specified period, and directs that the deportation order shall become effective automatically if respondent does not depart." Gordon, Mailman and Yale-Loehr, supra, at § 74.02 [4][c]. Where an alien departs within the specified time period, the alien is not re-

garded as having been deported and thus obtains the benefits of departure without deportation. *Id.*

In contrast to a stay of deportation, which stops the physical removal of an alien from the country, a stay of voluntary departure stops the clock on the period within which an alien is required to depart and, if granted, effectively extends the time during which an alien is allowed to leave voluntarily. An alien "'does not *lose* something when offered the additional opportunity to depart voluntarily. On the contrary, he retains precisely the same right to judicial review he would otherwise have had; it is only that his alternative to continued litigation has been made more attractive.'" *Harchenko v. INS,* 379 F.3d 405, 412-413 (6th Cir.2004) (quoting *Castaneda v. INS,* 23 F.3d 1576, 1582 (10th Cir.1994)). In other words, an alien granted voluntary departure has a choice-leave within the specified time period and retain the benefits afforded, or remain, litigate the claim to the very end, but bear the consequences of having decided not to depart. *See Ngarurih,* 371 F.3d at 194 ("[A]n alien considering voluntary departure must decide whether an exemption from the ordinary bars on subsequent relief is worth the cost of returning to the home country within the period specified. Having made his election, however, the alien takes all the benefits and all the burdens of the statute together.").

The relief sought by a stay of deportation, therefore, is different from that sought by a stay of voluntary departure.[8]

---

[8] Under IIRIRA's transitional rules, the relief sought by stays of deportation was particularly significant because removal of an alien under those rules stripped this Court of jurisdiction to hear their petition for review. *See Elian,* 370 F.3d at 900. During the course of this appeal, Congress repealed the IIRIRA transitional rules, reestablishing our jurisdiction to hear the appeals of aliens in spite of their departure. *See Obale v. Att'y Gen.,* 453 F.3d 151, 160 n. 9 (3d Cir.2006) ("Congress enacted 8 U.S.C. § 1252(b)(3)(B) in order to permit judicial review of a removal order even if the alien

Whereas a stay of deportation is aimed at preventing forcible removal, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded. In addition, the equities involved in the two types of stays may also differ. *See Rife*, 374 F.3d at 616 ("[W]e do not hold that every alien who warrants a stay of removal also warrants a stay of voluntary departure . . . because there may be cases where the equities relevant to the two types of stay will balance differently."). Accordingly, we will not construe a stay of deportation automatically to include a stay of the period

---

has departed the United States."). This enactment did not, however, render a stay of deportation and a stay of voluntary departure functionally the same. Notwithstanding the repeal of the IIRIRA transitional rules, these two forms of relief continue to differ in both their practical and equitable respects. Consequently, the Government deserves prompt notice of precisely what relief a petitioner seeks. Indeed, it is a petitioner's responsibility. Under Federal Rule of Appellate Procedure 18, which governs stays pending review of an agency decision, a motion for a stay must include "the reasons for granting the relief requested and the facts relied on." Fed. R.App. P. 18(a)(2)(B)(i). In this case, Petitioners styled their motion as a "stay of deportation" and, in support, noted that because stays are no longer automatically issued they are "subject to being *physically deported* from the United States at any time" and that a "denial of a Stay of Deportation will allow the INS to act to *deport them* and render [the] Petition for Review moot." It is clear, then, that the reasons offered by Petitioners for granting their stay were aimed at deportation rather than their period for voluntary departure. Petitioners thus failed to give appropriate notice that they sought relief in the form of a stay of voluntary departure. As a result, they are now not entitled to that relief. *See Thapa*, 460 F.3d at 336-37 (stating that the equities relevant to a stay of a voluntary departure order and a stay of an order of removal may balance differently and concluding that granting Thapa's motion for a stay of the voluntary departure order did not necessitate granting his motion for a stay of the order of removal).

for voluntary departure. *See Bocova*, 412 F.3d at 268-69 (noting that while the same test for granting a stay of removal applies to a stay of voluntary departure, "that test may play out differently as to each type of relief" so that the alien should be required to "be precise about the relief requested"); *Alimi*, 391 F.3d at 893 (noting that the differences between a stay of removal and a stay tolling the period for voluntary departure "require[ ] attention by both the parties and the court, attention that is possible only if a stay of removal and extra time for voluntary departure are treated as distinct subjects that must be separately addressed").

iv. Whether Petitioners are entitled to nunc pro tunc relief

Petitioners would have us now adjudicate their request for a stay of voluntary departure *nunc pro tunc*. *Nunc pro tunc*, Latin for "now for then," refers to a court's inherent power to enter an order having retroactive effect. *Black's Law Dictionary* 1100 (8th ed.2004). "When a matter is adjudicated *nunc pro tunc*, it is as if it were done as of the time that it should have been done." *Edwards v. INS*, 393 F.3d 299, 308 (2d Cir.2004). It is a "far-reaching equitable remedy" applied in "certain exceptional cases," *Iavorski v. INS*, 232 F.3d 124, 130 n. 4 (2d Cir.2000), typically aimed at "rectify[ing] any injustice [to the parties] suffered by them on account of judicial delay." *Weil v. Markowitz*, 829 F.2d 166, 175 (D.C.Cir.1987). In the context of agency action, we have held that an award of " *nunc pro tunc* relief [should] be available where agency error would otherwise result in an alien being deprived of the opportunity to seek a particular form of . . . relief." *Edwards*, 393 F.3d at 310-11. *See also Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C.Cir.1995) (noting that *nunc pro tunc* relief has been applied to embrace agency action "where necessary to put the victim of agency error in the economic position it would have occupied but for the error" (internal quotation marks and citation omitted)).

While we are sympathetic to the position Petitioners find themselves in, this is simply not a case in which *nunc pro tunc* relief is warranted. As of November 25, 2002, Petitioners' immediate relative petitions were approved. Two days later, the BIA issued its decision in the underlying asylum case, affirming the IJ's order. The BIA, however, granted Petitioners an additional 30 days within which to depart. Petitioners then had several options. First, they could have filed a motion to reopen to adjust their status sooner. Indeed, the record discloses that Petitioners did not move to reopen until January 2003, well after their period for voluntary departure had expired. Second, they could have sought an extension of their period for voluntary departure from the INS District Director. Finally, they could have moved in this Court for a stay of voluntary departure. By exercising any of these options, Petitioners might have preserved their privilege to depart voluntarily. In other words, this is not a case in which error on the part of the court or the INS put Petitioners in a worse position. An order, *nunc pro tunc,* granting a stay of voluntary departure is therefore inappropriate. *Cf. Edwards,* 393 F.3d at 312 (granting *nunc pro tunc* relief to aliens who were erroneously denied the opportunity to apply for INA § 212(c) relief); *Batanic v. INS,* 12 F.3d 662, 667-68 (7th Cir.1993) (ordering BIA to allow petitioner to apply for asylum *nunc pro tunc* to remedy IJ's error in proceeding with hearing without petitioner's attorney present); *see also Weil v. Markowitz,* 898 F.2d 198, 201 (D.C.Cir.1990) ("The paradigm case [for *nunc pro tunc* relief] involves a party who has died after his case has been submitted to the court, but before the court has entered judgment. Cases in which a party would otherwise be prejudiced by the clerk's delay in entering judgment stand upon the same footing." (citations omitted)).

Finally, we note one other factor that distinguishes *Desta* and *Rife* from this case. In each of those cases, our sister circuits were concerned that their prior case law had given petitioners reason to believe that they need not file a motion for a

stay of voluntary departure. *Desta,* 365 F.3d at 749 ("Based on the prior state of the law, [petitioner] (and his counsel) would have been justified in thinking that the period of voluntary departure would be automatically stayed, just as it had been prior to IIRIRA."); *Rife,* 374 F.3d at 616 ("[O]ur past practice gave [petitioners] reason to believe that the stay of removal included a stay of their voluntary departure period as well."). This concern is notably absent here.

This Court has never held that aliens who file a petition for review are automatically entitled to a stay of voluntary departure. To the contrary, in *Ballenilla-Gonzalez,* we highlighted the fact that the petitioner there had not filed for a petition of review within the thirty days fixed by the period for voluntary departure nor had she requested a stay of the voluntary departure period pending appeal. 546 F.2d at 521. We noted that "[t]hese procedures enable the [BIA] or this court, in cases where a prima facie meritorious basis for appeal is shown, to permit its being pursued without prejudice to voluntary departure." *Id.* Thus, in contrast to the Eighth and Ninth Circuits, both of which had expressly criticized then existing law, in *Ballenilla-Gonzalez* we expressed approval for procedures already in place prior to the passage of IIRIRA. For that reason, we are not concerned, as the courts were in *Rife* and *Desta,* that Petitioners here may have been misled that they did not have to file a motion specifically seeking a stay of voluntary departure. If anything, our decision in *Ballenilla-Gonzalez* should have put them and their counsel on notice that a motion seeking such relief was necessary.

Although we decide that the stay of deportation should not be read so as to encompass a stay of voluntary departure, Petitioners may not be without a remedy. Under pre-IIRIRA regulatory authority, the INS District Director (now the appropriate Field Office Director, U.S. Immigration Customs Enforcement, Department of Homeland Security) may grant a *nunc pro tunc* extension of voluntary departure. *See* 8

C.F.R. § 1240.57 ("Authority to reinstate or extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director."); *see also* 6 Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* § 74.02[4][f] (rev. ed. 2005) ("Even after the expiration of the time for voluntary departure fixed by the immigration judge or the Board, a *nunc pro tunc* extension of the voluntary departure time may be granted by the district director if the [alien] presents a valid travel document and a confirmed reservation. In such cases the district director may cancel the warrant of deportation and may place in the [alien's] file an explanatory memorandum and a copy of the letter authorizing the extension of voluntary departure time.").

Petitioners are both in their mid-to-late 60's and have been in the United States for more than a decade, without event. Their only child is a United States citizen, and the "immediate relative" petitions she submitted on her parents' behalf have already been approved. Furthermore, it appears that any delay on Petitioners' part may be attributable to counsel's failure to recommend that they seek to extend their voluntary departure period before overstaying that period, an omission that thereby made them ineligible for adjustment of their status based on approved "immediate relative" petitions. In this case, the INS District Director might well consider exercising his or her discretion to grant an extension so that Petitioners may adjust their status to lawful permanent residents. The law does not, however, support this Court granting the relief sought in the pending petitions.

The petitions for review are **DENIED**.

APPENDIX B

United States Court of Appeals,
Second Circuit.

Vladimir IOURI and Vera Yuriy,
Petitioners,
v.
John ASHCROFT, Attorney General of the United States,
Respondent.

Docket Nos. 02-4992(L), 02-4998 (CON),
03-40132 (CON), 03-40134 (CON).

Argued: March 22, 2005.
Decided: Sept. 11, 2006.
Amended: Sept. 13, 2006.

HALL, Circuit Judge.

Vladimir Iouri and Vera Yuriy ("Petitioners"), natives of the former Soviet Union and citizens of the now independent Ukraine, petition for review from a November 27, 2002 decision of the Board of Immigration Appeals ("BIA") summarily affirming an Immigration Judge's ("IJ") order finding Petitioners incredible and denying their application for asylum, withholding of return, and relief under the Convention Against Torture ("CAT"). Petitioners also seek review of a May 29, 2003 order of the BIA denying their motion to reopen immigration proceedings. The purpose of the motion to reopen was to adjust their status to that of lawful permanent residents on the basis of approved "immediate relative" petitions filed on Petitioners' behalf by their daughter, a United States citizen. The BIA denied the motion because by the time it was filed, Petitioners had remained in the United

States beyond the period granted for voluntary departure and were, therefore, statutorily barred from seeking adjustment of status.

On petition for review, Petitioners raise two issues. First, whether the BIA erred by failing to take into account their advanced age in assessing their credibility. Second, whether their voluntary departure period should be deemed stayed, tolled, or otherwise extended by their having timely filed for a petition for review and moved for a stay of deportation in their underlying asylum case.

I. Background

Petitioners-husband and wife-are natives of the former Soviet Union and citizens of the now independent Ukraine. Iouri entered the United States on or about April 4, 1993 as a non-immigrant visitor. Yuriy followed on or about August 3, 1993, also as a non-immigrant visitor. Soon after his wife's arrival, Iouri sought asylum claiming that as a member of the Ukraine Orthodox Church, he was persecuted and has a well-founded fear of future persecution due to his religious beliefs and affiliation.[1]

In his asylum application, Iouri claims that he has long been mistreated due to his religious beliefs. In particular, he asserts that under Communist rule, his family was unable to practice their religion openly, and as a child, he was punished in school for attending Easter services. His application also recounts alleged mistreatment while he served in the army. In Hungary, for example, Iouri asserts he refused to shoot protestors due to his moral and religious convictions, and as a result, he was mistreated and threatened with punishment. Iouri claims his commanding officer arrested him while he was praying.[2] Beyond that, Iouri contends he was generally

---

[1] Yuriy is claimed as a dependent.

[2] After leaving the army, Iouri claims he studied to be a merchant mariner but was unable to get a job because he refused to fight in

mocked, threatened, and forced to serve in an "atmosphere of general hostility."

According to Petitioners, conditions did not improve with *perestroika* and independence. They report receiving threatening letters and phone calls; letters they sent were opened and inspected; and the Russian Orthodox and Ukranian Catholic churches, backed by the government, did "their best to declare [Petitioner's] religion out-of-law."

Iouri's asylum application, however, made no mention of any specific incidents of abuse or violence against him or his wife. Indeed, Iouri mentioned specific incidents for the first time during an asylum interview and in an addendum to his application submitted to the IJ in June 1999. In the addendum, Iouri claimed that (1) he was attacked in December of 1991 and threatened with death if he did not stop attending religious services; (2) his apartment was vandalized in March of 1992; and (3) in February of 1993, his apartment was again broken into and vandalized, and he was beaten and admitted to the hospital with a ruptured kidney.

A hearing was held on July 6, 2000 at which both Petitioners testified. With regard to the 1991 incident, Iouri claimed for the first time that he was knocked unconscious, suffered injuries to his head and chest, and was hospitalized for seven days. As to the 1992 vandalism incident, he testified that graffiti with death threats was painted on the wall, and when he attempted to report the incident, police informed him the case was closed and advised him to stop practicing his religion. When Yuriy testified, she could not remember the date of the third incident, stating that it occurred either in December of 1992 or February of 1993. She also testified that her husband was attacked on the street, not in the apartment. When brought to her attention that submitted docu-

---

Hungary. He states that he eventually found a job in a toy factory where he met his wife. He alleges that the KGB warned his managers about his and his wife's "political unreliability."

ments indicated the attack occurred in her home, she changed her testimony and stated that a fourth incident in which her husband was beaten occurred sometime in December of 1992. Her husband, however, did not testify to that effect, and there is no mention in any of the documents of a December 1992 attack.

The IJ denied Petitioners' application finding that Iouri's testimony was not credible. Specifically, the IJ found his testimony to be "generally halting and vague with regards to some significant events." As to the 1991 incident, the IJ noted that this had not been mentioned anywhere else and there were no documents corroborating that he had been hospitalized. The IJ also noted inconsistencies in the testimony between Iouri and his wife-i.e., she claimed he was attacked in 1993 on the street, not in the apartment, and she testified to a fourth incident never once mentioned by Iouri. Finally, the IJ explained that Iouri was vague in describing the tenets of his faith.[3]

Although the IJ denied Petitioners' application for asylum, he granted their request to voluntarily depart pursuant to former Immigration and Nationality Act ("INA") § 244(e)(1), 8 U.S.C. § 1254(e) (repealed 1996). Petitioners were warned that if they failed to depart voluntarily, the order granting voluntary departure would be withdrawn and they would be ordered deported to the Ukraine. They were also warned, by written order, of the statutory consequences of failing to depart; specifically, they would be ineligible for certain immigration relief, including adjustment of status, for a term of five years. *Id.* §§ 1252b(e)(2) & (5). Petitioners filed a timely appeal which tolled the first thirty days of their voluntary de-

---

[3] In this regard, the IJ noted that Petitioners submitted a letter in support of their asylum application from a rector at a Russian Orthodox Church that Petitioners attend in the United States which, according to other materials is, in fact, the church that caused them problems in the Ukraine.

parture period. On November 27, 2002, the BIA summarily affirmed the IJ's decision and granted Petitioners a new period of voluntary departure lasting until December 27, 2002.

Petitioners filed their petitions for review with this court on December 26, 2002 and December 27, 2002. Along with the petitions for review, Petitioners also requested that we grant them a stay of deportation. They did not, however, specifically request a stay of their voluntary departure period or seek an extension of the departure period from the Immigration and Naturalization Service's ("INS") District Director. Nor did they depart. Instead, they filed a motion before the BIA to reopen proceedings in order to apply for adjustment of status on the basis of approved "immediate relative" petitions filed on their behalf by their daughter, now a United States citizen. The BIA denied their motion because they had overstayed their departure period and were, therefore, statutorily barred from applying for adjustment of status. This appeal followed.

II. Discussion

A. Asylum Application

Because the BIA summarily affirmed the IJ's decision to deny Petitioner's application for asylum, we review the IJ's decision directly. *Twum v. INS*, 411 F.3d 54, 58 (2d Cir.2005). In turn, our scope of review is "exceedingly narrow." *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir.2003) (internal quotation marks omitted). In reviewing a denial of an application for asylum, we "defer to the immigration court's factual findings as long as they are supported by 'substantial evidence,' " and "we will not disturb a factual finding if it is supported by 'reasonable, substantial and probative' evidence in the record when considered as a whole." *Id.* (quoting *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir.2000)). Factual findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

When it comes to credibility determinations, we afford "particular deference" to the IJ in applying the substantial evidence test. *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 (2d Cir.2004) (internal quotation marks omitted). Thus, we look to see whether the IJ has provided "specific, cogent" reasons for her finding and whether those findings bear a "legitimate nexus" to the credibility determinations. *Id.* at 74 (internal quotation marks omitted). Where a credibility determination is based on specific examples of "inconsistent statements" or "contradictory evidence," a "reviewing court will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise." *Id.* (internal quotation marks omitted).

Here, the IJ clearly set forth specific and cogent reasons for his adverse credibility finding, stating:

> Again, for all the reasons: the internal discrepancies, the external inconsistencies with information on documents and the addendum to the I-589 request for asylum, the general vagueness of the testimony, the lack of key details and specifics with regard to the most critical portions of the claim, and the significant discrepancies between the testimony of the two respondents; for all these reasons, I find that the testimony does not rise to the level of believability and consistency in detail to provide us with a plausible and coherent account of the basis for the fear, and for that reason a negative credibility finding is made for each respondent.

Tr. 14-15.

These findings are supported by substantial evidence. As noted above, there were significant discrepancies between Iouri's initial asylum application, the addendum, and his testimony. For example, the addendum did not note his hospitalization following the first incident and nowhere in the initial asylum application did he mention any of these incidents.

More telling are the discrepancies between the testimony of the two Petitioners. Not only did Yuriy testify that the February 1993 incident occurred while her husband was on the street, whereas he testified that it occurred in the couple's home, a fact his spouse would be unlikely to mistake, but she also testified to a fourth incident occurring in December of 1992 which is mentioned nowhere in her husband's testimony, the supporting asylum application, or even the addendum. These inconsistencies are sufficient to support the IJ's adverse credibility finding. *See Gao v. U.S. Atty. Gen.*, 400 F.3d 963, 964 (2d Cir.2005) (holding adverse credibility supported by substantial evidence where "numerous discrepancies as to dates and surrounding details [and petitioner's] testimony at his asylum hearing differed substantially from his initial written asylum application and first asylum interview . . . ").

Nevertheless, Petitioners argue that the IJ and BIA should have considered the passage of time and their advanced age in assessing their credibility. As the government correctly points out and as Petitioners acknowledge, however, this particular argument was not raised before the BIA and Petitioners therefore failed to exhaust their administrative remedies. Accordingly, this argument has been waived. *See Foster v. INS*, 376 F.3d 75, 78 (2d Cir.2004) ("To preserve a claim, we require '[p]etitioner to raise *issues* to the BIA in order to preserve them for judicial review.' ") (quoting *Cervantes-Ascencio v. INS*, 326 F.3d 83, 87 (2d Cir.2003)).[4] We there-

---

[4] Even if we did consider Petitioners' argument, it is without merit. Neither the passage of time nor Petitioners' advanced age adequately explains the inconsistencies here. With the passage of time and age, one expects memory to fade. Details such as dates may be forgotten or inaccurately recalled, but here Iouri totally failed to mention in his initial asylum application-an application filed shortly after his arrival in the United States-several grave incidents which go to the heart of his claim. It was more than five years later that he mentioned them, first in the addendum and then

fore deny the petitions for review of the underlying asylum application and petition for withholding of return.[5]

B. Voluntary Departure

As noted, Petitioners were granted-both by the IJ and the BIA-discretionary relief of voluntary departure in lieu of deportation pursuant to former INA § 244(e)(1).[6] "If adhered to, voluntary departure produces a win-win situation." *Bocova v. Gonzales,* 412 F.3d 257, 265 (1st Cir.2005). "For aliens, voluntary departure is desirable because it allows them to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, to avoid stigma and various penalties associated with forced removals . . . and it facilitates the possibility of return to the United States . . . ." *Lopez-Chavez v. Ashcroft,* 383 F.3d 650, 651 (7th Cir.2004). For the government, it expedites departures and reduces the costs that are typically associated with deporting individuals from the United States. *See Thapa v. Gonzales,* No. 06-1973, 2006 WL 2361248, at *4 (2d Cir. Aug.16, 2006) *Azarte v. Ashcroft,* 394 F.3d 1278, 1284 (9th Cir.2005).

---

while testifying before the IJ. Similarly, his wife testified to an incident never before mentioned. The severity of these incidents, coupled with the fact that they were not mentioned until sometime later, suggests this is more than a case of mere forgetfulness due to either age or passage of time. Accordingly, the IJ cannot be faulted for failing to excuse the inconsistencies or improved recollections on these grounds.

[5] Petitioners have not sought review of their CAT claim.

[6] Section 244(e)(1) provides that "the Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish . . . that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure . . . ." 8 U.S.C. § 1254(e)(1).

Following the BIA's decision to affirm the IJ, Petitioners were required to depart the United States by December 27, 2002. They did not. Instead, on January 23, 2003, they moved before the BIA to have their proceedings reopened in order to adjust their status based on "immediate relative" petitions filed on Petitioners' behalf by their daughter and approved by the INS on November 25, 2002. Because they had overstayed their time for voluntary departure, however, the BIA denied the motion. *See* 8 U.S.C. § 1252b(e)(2)(A) (repealed 1996) (aliens who fail to depart within the period for voluntary departure, "other than because of exceptional circumstances, shall not be eligible for [adjustment or change of status under section 245] for a period of 5 years after the scheduled date of departure . . . .").

The BIA's conclusions of law are reviewed *de novo* but where the BIA has applied the correct law, we review its decision to deny reopening for abuse of discretion. *Guan v. BIA*, 345 F.3d 47, 48 (2d Cir.2003). To get around the otherwise clear statutory bar to their seeking adjustment of status, Petitioners contend that either (1) their period for voluntary departure does not commence until this Court issues the mandate in the underlying asylum case or (2) because they sought a stay of deportation, we should enter a *nunc pro tunc* order staying their voluntary departure period. Either way, Petitioners argue the BIA erred in not granting their motion to reopen.

i. When does Petitioners' time to depart voluntarily begin to run?

Citing the Ninth Circuit's decision in *Contreras-Aragon v. INS*, 852 F.2d 1088, 1092 (9th Cir.1988), Petitioners first argue that their period for voluntary departure does not begin to run until we issue a mandate denying their petition for review in their underlying asylum case. *Contreras-Aragon*, however, is an "old law" case. At the time of *Contreras-Aragon*, the INA provided for automatic stays of deportation upon the filing of a petition for review. 8 U.S.C. §

1105a(a)(3) (repealed 1996). The *Contreras-Aragon* court reasoned that it was inconceivable "that Congress made such provision but intended to require aliens granted voluntary departure to seek repeated extensions of the voluntary departure period from the district director, in order to preserve the award of voluntary departure until our final determination . . . ." 852 F.2d at 1092. Thus, the court concluded that the right of voluntary departure should remain in effect throughout the period of appellate review and for whatever additional time the BIA afforded the petitioner in its decision. *Id.* In adopting this rule, the court rejected an alternative rule which would have preserved voluntary departure only where the alien petitions for review within the period specified for voluntary departure. Such a rule was unacceptable because, in the court's view, it would "shorten the statutory six month period" provided for under "old law" for filing a petition for review. *Id.* at 1096 (citing 8 U.S.C. 1252(c) (repealed 1996)).

Petitioners here, however, are subject to the transitional rule of IIRIRA because deportation proceedings against them commenced prior to April 1, 1997, and a final deportation order was entered after October 30, 1996. Pub.L. No. 104-208, § 309(c)(4), 110 Stat. 3009, 3009-546, 3009-625. Two changes made applicable by the transitional rules are relevant here. First, automatic stays are no longer granted; an alien must petition the court for a stay of deportation. *Id.* § 309(c)(4)(F). Second, petitions for review must be filed within 30 days of the final order of deportation. *Id.* § 309(c)(4)(C).

These changes have so undercut the rationale of *Contreras-Aragon* that Petitioners reliance on that decision is misplaced. Indeed, these very same changes prompted the Ninth Circuit several years later in *Zazueta-Carrillo v. Ashcroft,* 322 F.3d 1166 (9th Cir.2003)-a permanent rules case-to reconsider *Contreras-Aragon* and hold that the period for voluntary departure begins to run from the time the BIA

enters its order.[7] *Id.* at 1170-72. *See also Rife v. Ashcroft*, 374 F.3d 606, 614-15 (8th Cir.2004). Petitioners' period for voluntary departure, therefore, began to run upon issuance of the BIA's order denying their application for asylum and withholding of return. They are therefore barred from adjusting their status unless the period for voluntary departure was stayed, tolled, or otherwise extended by their having filed for a stay of deportation. We now turn to that issue.

ii. Whether the period for voluntary departure may be stayed, tolled, or otherwise extended

In *Thapa*, 2006 WL 2361248, following the position adopted by the majority of the Circuits, *compare Bocova*, 412 F.3d at 265-67 (holding that IIRIRA does not limit a court's authority to issue a stay of departure suspending the running of a voluntary departure period); *and El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir.2003) ("the District Director's authority to extend voluntary departure time periods does not limit this court's equitable authority to grant a stay of the voluntary departure period"); *and Rife*, 374 F.3d at 616 (holding that since IIRIRA permits stays of removal, voluntary departure can also be stayed); *and Lopez-Chavez*, 383 F.3d at 654 (concluding that under the permanent IIRIRA rules, a stay tolling the time for voluntary departure may be entered); *and Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir.2003); *with Ngarurih v. Ashcroft*, 371 F.3d 182,

---

[7] In *Elian v. Ashcroft*, 370 F.3d 897, 901 (9th Cir.2004), however, the court held that *Contreras-Aragon* still applied to cases governed by then-applicable transitional rules under IIRIRA due to the fact that under those rules the court loses jurisdiction to hear a petition for review if the alien leaves the United States. That we are deprived of jurisdiction under these circumstances may very well be a reason why voluntary departure might appropriately be stayed, tolled, or otherwise extended. It does not, however, provide a reason for *automatically* imposing such a stay until such time as we decide the merits of the underlying petition for review.

194 (4th Cir.2004) (holding that voluntary departure may not be stayed), we recently held that "we have the authority . . . to stay an agency order [of voluntary departure] pending . . . consideration of a petition for review on the merits." *Thapa,* 2006 WL 2361248, at *1. We did not address, however, our power to issue such a stay where, as here, the petitioners (1) moved only for a stay of removal and failed to make a motion expressly requesting a stay of voluntary departure, and (2) have now sought such relief well after the time for voluntary departure has expired.

iii. Whether Petitioners must have expressly requested a stay of the voluntary departure order

In *Thapa,* and most cases where other courts have held the period for voluntary departure may be stayed, the petitioner expressly moved for a stay of voluntary departure. *See Id.* at *3; *see, e.g., Nwakanma,* 352 F.3d at 327; *Lopez-Chavez,* 383 F.3d at 651. In contrast, Petitioners here sought a stay of *deportation,* but not a stay of *voluntary departure.* That said, two circuits-the Ninth Circuit in *Desta v. Ashcroft,* 365 F.3d 741, 743 (9th Cir.2004), and the Eighth Circuit in *Rife,* 374 F.3d at 616-have held that where an alien files a motion to stay removal before the period for voluntary departure expires, such a motion should be construed as including a motion to stay the voluntary departure period. According to both courts, this is so because, a motion seeking a stay of voluntary departure is "ancillary," *Desta,* 365 F.3d at 748, or "complementary," *Rife,* 374 F.3d at 616, to a stay of deportation. We disagree. For the reasons that follow, we join the First and Seventh Circuits, both of which have held that an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay. *Bocova,* 412 F.3d at 268; *Alimi v. Ashcroft,* 391 F.3d 888, 892-93 (7th Cir.2004)

When an alien is ordered deported, a warrant by the INS District Director is issued authorizing the officer to take the alien into custody and deport him or her. Gordon, Mailman &

Yale-Loehr, *Immigration Law and Procedure* § 72.08[1] [a] (rev. ed.2005). When this Court grants a stay of deportation, we are preventing the forced removal of an alien from the country. Such stays are particularly important in cases governed by IIRIRA's transitional rules because removal of an alien strips this Court of jurisdiction to hear their petition for review. *See Elian*, 370 F.3d at 900. Thus, if we deny a stay of deportation, we deprive ourselves of the opportunity to review a claim, and as a result, we may end up returning an alien to the very persecution he or she was fleeing in the first place.

Voluntary departure, in contrast, is a privilege granted an alien in lieu of deportation. *See Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir.1976). Although it carries with it significant restrictions barring an alien's readmission to the United States, *see Thapa*, 460 F.3d at 325, voluntary departure affords an alien certain benefits: "[I]t allows [him] to choose [his] own destination points, to put [his] affairs in order without fear of being taken into custody at any time, to avoid the stigma and various penalties associated with forced removals (including extended detention while the government procures the necessary travel documents and ineligibility for readmission for a period of five or ten years, *see* 8 U.S.C. § 1182(a)(9)(A)), and it facilitates the possibility of return to the United States, for example, by adjustment of status." *Id.* An "immigration judge's order granting voluntary departure usually withholds the entry of a deportation order, permitting the respondent to depart within a specified period, and directs that the deportation order shall become effective automatically if respondent does not depart." Gordon, Mailman and Yale-Loehr, supra, at § 74.02 [4][c]. Where an alien departs within the specified time period, the alien is not regarded as having been deported and thus obtains the benefits of departure without deportation. *Id.*

In contrast to a stay of deportation, which stops the physical removal of an alien from the country, a stay of vol-

untary departure stops the clock on the period within which an alien is required to depart and, if granted, effectively extends the time during which an alien is allowed to leave voluntarily. An alien "'does not *lose* something when offered the additional opportunity to depart voluntarily. On the contrary, he retains precisely the same right to judicial review he would otherwise have had; it is only that his alternative to continued litigation has been made more attractive.'" *Harchenko v. INS*, 379 F.3d 405, 412-413 (6th Cir.2004) (quoting *Castaneda v. INS*, 23 F.3d 1576, 1582 (10th Cir.1994)). In other words, an alien granted voluntary departure has a choice-leave within the specified time period and retain the benefits afforded, or remain, litigate the claim to the very end, but bear the consequences of having decided not to depart. *See Ngarurih*, 371 F.3d at 194 ("[A]n alien considering voluntary departure must decide whether an exemption from the ordinary bars on subsequent relief is worth the cost of returning to the home country within the period specified. Having made his election, however, the alien takes all the benefits and all the burdens of the statute together.").

The relief sought by a stay of deportation, therefore, is different from that sought by a stay of voluntary departure.[8] Whereas a stay of deportation is aimed at preserving the court's jurisdiction, a stay of the voluntary departure period is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded. In addition, the equities involved in the two types of stays may also differ. *See Rife*, 374 F.3d at 616 ("[W]e do not hold that every alien who warrants a stay of removal also

---

[8] In *Thapa*, we agreed with the observation in *Rife*, 374 F.3d at 616, that the equities relevant to a stay of a voluntary departure order and a stay of an order of removal may balance differently and concluded that granting Thapa's motion for a stay of the voluntary departure order did not necessitate granting his motion for a stay of the order of removal. *Thapa*, 460 F.3d at 326.

warrants a stay of voluntary departure . . . because there may be cases where the equities relevant to the two types of stay will balance differently."). Accordingly, we will not construe a stay of deportation automatically to include a stay of the period for voluntary departure. *See Bocova,* 412 F.3d at 268-69 (noting that while the same test for granting a stay of removal applies to a stay of voluntary departure, "that test may play out differently as to each type of relief" so that the alien should be required to "be precise about the relief requested"); *Alimi,* 391 F.3d at 893 (noting that the differences between a stay of removal and a stay tolling the period for voluntary departure "require[ ] attention by both the parties and the court, attention that is possible only if a stay of removal and extra time for voluntary departure are treated as distinct subjects that must be separately addressed").[9]

iv. Whether Petitioners are entitled to nunc pro tunc relief

Petitioners would have us now adjudicate their request for a stay of voluntary departure *nunc pro tunc.*[10] *Nunc pro*

---

[9] This is also consistent with Federal Rule of Appellate Procedure 18 pursuant to which stays pending review of an agency decision are issued. In pertinent part, Rule 18 provides that a motion for a stay must include "the reasons for granting the relief requested and the facts relied on." Fed. R.App. P. 18(a)(2)(B)(i). Here, Petitioners styled their motion as a "stay of deportation" and, in support, noted that because stays are no longer automatically issued they are "subject to being *physically deported* from the United States at any time" and that a "denial of a Stay of Deportation will allow the INS to act to *deport them* and render [the] Petition for Review moot." It is clear, then, that the reasons offered by Petitioners for granting their stay were aimed at deportation rather than their period for voluntary departure.

[10] Although Petitioners' request for nunc pro tunc relief distinguishes this case from *Thapa*, because the petitioner moved for a stay of the voluntary departure period before the period expired, *see Thapa*, 2006 WL 2361248, at *9, we stated in that case that our authority to stay an order of voluntary departure when the peti-

tunc, Latin for "now for then," refers to a court's inherent power to enter an order having retroactive effect. *Black's Law Dictionary* 1100 (8th ed.2004). "When a matter is adjudicated *nunc pro tunc*, it is as if it were done as of the time that it should have been done." *Edwards v. INS*, 393 F.3d 299, 308 (2d Cir.2004). It is a "far-reaching equitable remedy" applied in "certain exceptional cases," *Iavorski v. INS*, 232 F.3d 124, 130 n. 4 (2d Cir.2000), typically aimed at "rectify[ing] any injustice [to the parties] suffered by them on account of judicial delay." *Weil v. Markowitz*, 829 F.2d 166, 175 (D.C.Cir.1987). In the context of agency action, we have held that an award of " *nunc pro tunc* relief [should] be available where agency error would otherwise result in an alien being deprived of the opportunity to seek a particular form of . . . relief." *Edwards*, 393 F.3d at 310-11. *See also Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C.Cir.1995) (noting that *nunc pro tunc* relief has been applied to embrace agency action "where necessary to put the victim of agency error in the economic position it would have occupied but for the error" (internal quotation marks and citation omitted)).

While we are sympathetic to the position Petitioners find themselves in, this is simply not a case in which *nunc pro tunc* relief is warranted. As of November 25, 2002, Petitioners' immediate relative petitions were approved. Two days later, the BIA issued its decision in the underlying asylum case, affirming the IJ's order. The BIA, however, granted Petitioners an additional 30 days within which to depart. Petitioners then had several options. First, they could have filed a motion to reopen to adjust their status sooner. Indeed, the record discloses that Petitioners did not move to reopen until January 2003, well after their period for voluntary departure had expired. Second, they could have sought an extension of

---

tioner moves for relief after the departure period expires is "more questionable" than our authority to stay the order when the petitioner moves for relief prior to the period's expiration. *See Id.*

their period for voluntary departure from the INS District Director. Finally, they could have moved in this Court for a stay of voluntary departure. By exercising any of these options, Petitioners might have preserved their privilege to depart voluntarily. In other words, this is not a case in which error on the part of the court or the INS put Petitioners in a worse position. An order, *nunc pro tunc*, granting a stay of voluntary departure is therefore inappropriate. *Cf. Edwards*, 393 F.3d at 312 (granting *nunc pro tunc* relief to aliens who were erroneously denied the opportunity to apply for INA § 212(c) relief); *Batanic v. INS*, 12 F.3d 662, 667-68 (7th Cir.1993) (ordering BIA to allow petitioner to apply for asylum *nunc pro tunc* to remedy IJ's error in proceeding with hearing without petitioner's attorney present); *see also Weil v. Markowitz*, 898 F.2d 198, 201 (D.C.Cir.1990) ("The paradigm case [for *nunc pro tunc* relief] involves a party who has died after his case has been submitted to the court, but before the court has entered judgment. Cases in which a party would otherwise be prejudiced by the clerk's delay in entering judgment stand upon the same footing." (citations omitted)).

Finally, we note one other factor that distinguishes *Desta* and *Rife* from this case. In each of those cases, our sister circuits were concerned that their prior case law had given petitioners reason to believe that they need not file a motion for a stay of voluntary departure. *Desta*, 365 F.3d at 749 ("Based on the prior state of the law, [petitioner] (and his counsel) would have been justified in thinking that the period of voluntary departure would be automatically stayed, just as it had been prior to IIRIRA."); *Rife*, 374 F.3d at 616 ("[O]ur past practice gave [petitioners] reason to believe that the stay of removal included a stay of their voluntary departure period as well."). This concern is notably absent here.

This Court has never held that aliens who file a petition for review are automatically entitled to a stay of voluntary departure. To the contrary, in *Ballenilla-Gonzalez*, we highlighted the fact that the petitioner there had not filed for a pe-

tition of review within the thirty days fixed by the period for voluntary departure nor had she requested a stay of the voluntary departure period pending appeal. 546 F.2d at 521. We noted that "[t]hese procedures enable the [BIA] or this court, in cases where a prima facie meritorious basis for appeal is shown, to permit its being pursued without prejudice to voluntary departure." *Id.* Thus, in contrast to the Eighth and Ninth Circuits, both of which had expressly criticized then existing law, in *Ballenilla-Gonzalez* we expressed approval for procedures already in place prior to the passage of IIRIRA. For that reason, we are not concerned, as the courts were in *Rife* and *Desta,* that Petitioners here may have been misled that they did not have to file a motion specifically seeking a stay of voluntary departure. If anything, our decision in *Ballenilla-Gonzalez* should have put them and their counsel on notice that a motion seeking such relief was necessary.

Although we decide that the stay of deportation should not be read so as to encompass a stay of voluntary departure, Petitioners may not be without a remedy. Under pre-IIRIRA regulatory authority, the INS District Director (now the appropriate Field Office Director, U.S. Immigration Customs Enforcement, Department of Homeland Security) may grant a *nunc pro tunc* extension of voluntary departure. *See* 8 C.F.R. § 1240.57 ("Authority to reinstate or extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director."); *see also* 6 Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* § 74.02[4][f] (rev. ed. 2005) ("Even after the expiration of the time for voluntary departure fixed by the immigration judge or the Board, a *nunc pro tunc* extension of the voluntary departure time may be granted by the district director if the [alien] presents a valid travel document and a confirmed reservation. In such cases the district director may cancel the warrant of deportation and may place in the [alien's] file an explanatory

memorandum and a copy of the letter authorizing the extension of voluntary departure time.").

Petitioners are both in their mid-to-late 60's and have been in the United States for more than a decade, without event. Their only child is a United States citizen, and the "immediate relative" petitions she submitted on her parents' behalf have already been approved. Furthermore, it appears that any delay on Petitioners' part may be attributable to counsel's failure to recommend that they seek to extend their voluntary departure period before overstaying that period, an omission that thereby made them ineligible for adjustment of their status based on approved "immediate relative" petitions. In this case, the INS District Director might well consider exercising his or her discretion to grant an extension so that Petitioners may adjust their status to lawful permanent residents. The law does not, however, support this Court granting the relief sought in the pending petitions.

The petitions for review are **DENIED**.

77

2

12-10-07

No. 07-259

In the Supreme Court of the United States

VLADIMIR IOURI AND VERA YURIY, PETITIONERS

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals permissibly construed petitioners' motions filed with that court—which sought only a stay of their removal from the United States and made no reference to a stay of the period during which they could voluntarily depart the United States—not to encompass a request for a stay of the voluntary departure period.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Alimi v. *Ashcroft*, 391 F.3d 888 (7th Cir. 2004) 9, 14, 17
A-M-, *In re*, 23 I. & N. Dec. 737 (B.I.A. 2005) 6
Bocova v. *Gonzales*, 412 F.3d 257 (1st Cir. 2005) 9, 12, 13, 17
Coleman v. *Thompson*, 501 U.S. 722 (1991) 18
Dada v. *Mukasey*, cert. granted, No. 06-1181 (Sept. 25, 2007) 12, 20
Desta v. *Ashcroft*, 365 F.3d 741 (9th Cir. 2004) 9, 13, 14, 19
El Himri v. *Ashcroft*, 344 F.3d 1261 (9th Cir. 2003) 12
Foti v. *INS*, 308 F.2d 779 (2d Cir. 1962), rev'd, 375 U.S. 217 (1963) 19
INS v. *St. Cyr*, 533 U.S. 289 (2001) 2
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 18
Lawrence v. *Florida*, 127 S. Ct. 1079 (2007) 18
Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 18
Lopez-Chavez v. *Ashcroft*, 383 F.3d 650 (7th Cir. 2004) 2, 12
Macotaj v. *Gonzales*, 424 F.3d 464 (6th Cir. 2005) 14

Cases—Continued Page

Magala v. *Gonzales*, 434 F.3d 523 (7th Cir. 2005) 18
Mullai v. *Ashcroft*, 385 F.3d 635 (6th Cir. 2004) 13
Ngarurih v. *Ashcroft*, 371 F.3d 182 (4th Cir. 2004) ... 12, 13
Nwakanma v. *Ashcroft*, 352 F.3d 325 (6th Cir. 2003) 12
Obale v. *Attorney Gen.*, 453 F.3d 151 (3d Cir. 2006) 12
Pioneer Inv. Servs. Co. v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) 18
Reynoso-Lopez v. *Ashcroft*, 369 F.3d 275 (3d Cir. 2004) 13
Rife v. *Ashcroft*, 374 F.3d 606 (8th Cir. 2006) ..... *passim*
Sviridov v. *Ashcroft*, 358 F.3d 722 (10th Cir. 2004) 13
Thapa v. *Gonzales*, 460 F.3d 323 (2d Cir. 2006) ... 2, 8, 9, 12
Thomas v. *Arn*, 474 U.S. 140 (1985) 14, 15
United States v. *Boyle*, 469 U.S. 241 (1985) 18
Vidal v. *Gonzales*, 491 F.3d 250 (5th Cir. 2007) 12
Wainwright v. *Torna*, 455 U.S. 586 (1982) 18

Treaty, statutes, regulations and rule:

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 5
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 2
§ 304(a)(3), 110 Stat. 3009-597 4
§ 306(b), 110 Stat. 3009-612 19
§ 308(b)(6), § 110 Stat. 3009-615 4

Statutes, regulations and rule—Continued Page

§ 309(c)(1), 110 Stat. 3009-625 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* ... 2
8 U.S.C. 1101(a)(47)(B)(i) 5
8 U.S.C. 1105a 19
8 U.S.C. 1105a(a)(3) (1994) 19
8 U.S.C. 1182(a)(9)(A) 2
8 U.S.C. 1229a(b)(4)(A) 17
8 U.S.C. 1229c(a)(1) 2, 3
8 U.S.C. 1229c(b)(1) 2, 3, 5
8 U.S.C. 1229c(b)(1)(A)-(C) 2, 3
8 U.S.C. 1229c(b)(1)(D) 2
8 U.S.C. 1229c(b)(2) 3, 12
8 U.S.C. 1229(d) (Supp. V 2005) 4
8 U.S.C. 1229c(d)(1) (Supp. V 2005) 4
8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005) 4
8 U.S.C. 1229c(f) 3, 12
8 U.S.C. 1252b(e)(2)(A) (1994) 4
8 U.S.C. 1252b(e)(5) (1994) 4
8 U.S.C. 1254(e)(1) (1994) (§ 244(e)(1)) 2, 3
Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 812, § 812, 119 Stat. 3057 4
8 C.F.R.:
Section 240.26(f) (2002) 4, 6
Section 1240.26(a) 4
Section 1240.26(d) 3
Section 1240.26(f) (2004) 6

Regulations and rule—Continued: Page

Section 1240.26(f) 3
Section 1240.57 11
Section 1241.1(f) 3
Fed. R. App. P. 18(a)(2)(B)(i) 9, 10, 17

Miscellaneous:

72 Fed. Reg. (2007):
p. 67,674 ..... 15, 16
p. 67,682 16
Executive Office for Immigration Review, United States Dep't of Justice, *FY 2006 Statistical yearbook* (Feb. 2007), <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf> 18

In the Supreme Court of the United States

No. 07-259

VLADIMIR IOURI AND VERA YURIY, PETITIONERS

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-22a) is reported at 487 F.3d 76. An earlier opinion of the court of appeals (Pet. App. 23a-41a) is reported at 464 F.3d 172. The orders of the Board of Immigration Appeals (App., *infra*, 1a-2a, 3a-4a, 5a-6a, 7a-8a), and the decision of the immigration judge (App., *infra*, 9a-24a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2007. The petition for a writ of certiorari was filed on August 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101 *et seq.*, as amended in 1996, provides that "[t]he Attorney General may permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1).[1] Voluntary departure may be granted before the initiation of removal proceedings or during the course of such proceedings, 8 U.S.C. 1229c(a)(1), and also may be granted at the close of removal proceedings in lieu of an order that the alien be removed from the United States, 8 U.S.C. 1229c(b)(1). Aliens who receive voluntary departure avoid the five- to ten-year period of inadmissibility that would result from an order of removal. See 8 U.S.C. 1182(a)(9)(A). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006) (quoting *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)).

To qualify for a grant of voluntary departure at the close of removal proceedings, an alien must satisfy certain statutory conditions, including establishing that he "has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D); see 8 U.S.C.

---

[1] Because petitioners' deportation proceedings were commenced prior to the April 1, 1997, effective date of the relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, the grant of voluntary departure to petitioners in this case is governed by Section 244(e)(1) of the INA (which was codified at 8 U.S.C. 1254(e)(1) (1994)). See IIRIRA § 309(c)(1), 110 Stat. 3009-625 (effective date provisions); *INS* v. *St. Cyr*, 533 U.S. 289, 317-318 (2001).

1229c(b)(1)(A)-(C). Because the Act provides that the Attorney General "may" permit an alien to depart voluntarily, see 8 U.S.C. 1229c(a)(1) and (b)(1); 8 U.S.C. 1254(e)(1) (1994), the determination whether to allow an alien to do so is discretionary with the Attorney General, and with the immigration judge (IJ) and Board of Immigration Appeals (BIA or Board) who act on his behalf. The INA, as amended by IIRIRA, provides that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure." 8 U.S.C. 1229c(f). It also bars a court from "order[ing] a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." *Ibid.*

The Act, again as amended by IIRIRA, prescribes that, when an alien is granted voluntary departure at the conclusion of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). An IJ who grants voluntary departure must "also enter an alternate order [of] removal," which takes effect if the alien fails to depart within the period specified in the voluntary departure order. 8 C.F.R. 1240.26(d); see 8 C.F.R. 1241.1(f). After entry of a final order, authority to extend a period of voluntary departure specified initially by an IJ or the BIA is vested in the district director or other officers of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security (DHS), subject to the statutory maximum, instituted in IIRIRA, of 60 days in the case of voluntary departure granted at the conclusion of removal proceedings. See 8 C.F.R. 1240.26(f).[2] Failure "to depart the United States within

---

[2] At the time at issue in this case, the power to extend a period of voluntary departure was vested in the relevant district director of the

the time period specified" results, *inter alia*, in the alien's becoming "ineligible, for a period of 10 years," to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (Supp V. 2005); see 8 C.F.R. 1240.26(a).[3]

2. a. Petitioners, a husband and wife, are citizens of Ukraine who entered the United States in 1993 as non-immigrant visitors for pleasure. Soon after their arrival, petitioners sought asylum, with petitioner Iouri claiming that he had been persecuted because of his membership in the Ukranian Orthodox Church and petitioner Yuriy claiming eligibility as a dependent.[4] Pet. App. 5a & n.1.

b. On November 22, 1996, the Immigration and Naturalization Service (INS) issued Orders to Show Cause and Notices of Hearing alleging that petitioners had overstayed their visas and were removable as a result.

Immigration and Naturalization Service. 8 C.F.R. 240.26(f) (2002).

[3] At the time at issue in this case, the INA provided that an alien who was granted voluntary departure and did not depart within the time allotted, "other than because of exceptional circumstances," was barred from receiving certain enumerated forms of relief, including adjustment of status, for a period of five years. 8 U.S.C.1252b(e)(2)(A) (1994); see 8 U.S.C. 1252b(e)(5) (1994). That provision was repealed by Section 308(b)(6) of IIRIRA, 110 Stat. 3009-615, and redesignated as amended as 8 U.S.C. 1229c(d) (Supp. V 2005), by IIRIRA § 304(a)(3), 110 Stat. 3009-597. That provision was in turn amended and redesignated as 8 U.S.C. 1229c(d)(1) by Section 812 of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 3057. Because petitioners have never argued that their overstay of voluntary departure should have been excused based on "exceptional circumstances," the differences between these provisions are not directly at issue here.

[4] In the administrative record, petitioner Vera Yuriy is often referred to as "Vera Iouri."

Admin. R. 364-367; 388-394. A hearing was held before an IJ at which petitioners both testified. Pet. App. 6a. On December 8, 2000, the IJ issued an oral decision that made "a negative credibility finding" with respect to each petitioner, App., *infra*, 22a, and denied their applications for asylum and for withholding of removal pursuant to both federal immigration law and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, Pet. App. 23a. The IJ granted petitioners' alternative requests for voluntary departure, ordering that they be permitted to depart "until February 6th, 2001, or any extension that may be granted by the Board of Immigration Appeals or the Immigration and Naturalization Service." *Ibid.* The IJ also ordered that if petitioners "fail to depart when and as required, the order granting voluntary departure shall be withdrawn without further notice or proceedings" and petitioners "shall be ordered deported from the United States to Ukraine on the charges contained in the Order to Show Cause." *Ibid.* In a separate written order, petitioners were informed of the statutory consequences of failing to depart within the time specified, including the fact that they would be ineligible for adjustment of status for a period of five years. *Id.* at 7a-8a; see note 3, *supra*.

Petitioners filed timely appeals of the IJ's decision with the BIA, Pet. App. 8a, which had the effect of rendering the IJ's order non-final and suspending the voluntary departure period pending appeal. See 8 U.S.C. 1101(a)(47)(B)(i) (order "become[s] final" upon affirmance by the BIA or the expiration of time for seeking BIA review); 8 U.S.C. 1229c(b)(1) (authorizing the At-

torney General to permit voluntary departure "at the conclusion of a [removal] proceeding under section 1229a"); *In re A-M-*, 23 I. & N. Dec. 737, 744 (B.I.A. 2005). On November 27, 2002, the BIA issued two orders summarily affirming the IJ's decision. App., *infra*, 5a-6a, 7a-8a. The Board ordered that petitioners would be permitted to depart the country voluntarily "within 30 days from the date of this order or any extension beyond that time as may be granted by the district director." *Id.* at 5a, 7a. It also warned that failure to do so would result in petitioners being removed as provided in the IJ's order and render them ineligible "for any further relief" for a specified number of years. *Id.* at 6a, 8a.[5]

c. On December 26, 2002, one day before the expiration of the voluntary departure periods established by the BIA's orders, petitioners filed motions to stay their removal with the United States Court of Appeals for the Second Circuit. On December 27, 2002, petitioners filed petitions for review of the BIA's decisions. In neither filing did petitioners ask the Second Circuit to stay their voluntary departure periods, Pet. 5; Pet. App. 8a, nor did they seek extensions of their voluntary departure periods from the appropriate district director, see 8 C.F.R. 240.26(f) (2002); 8 C.F.R. 1240.26(f) (2004). "Nor did they depart." Pet. App. 8a.[6] In January 2003,

---

[5] The BIA's orders mistakenly stated that petitioners' ineligibility period would last ten years (the period specified by current law) rather than the five-year period that is applicable in this case. See notes 1, 3, *supra*.

[6] A review of the Second Circuit's docket reveals that the court of appeals never acted on petitioners' motions to stay their orders of removal. A September 5, 1995, memorandum issued by the Clerk of the Second Circuit with the concurrence of the United States Attorney for

still in the United States, petitioners filed motions with the BIA seeking to reopen their removal proceedings to permit them to apply for adjustment of their immigration status based on the INS's November 25, 2002, approval of an immediate relative petition filed on petitioners' behalf by their United States citizen daughter. Pet. App. 8a, 20a. On May 29, 2003, the BIA denied the motions to reopen, concluding that petitioners were statutorily ineligible for adjustment of status because they had overstayed their voluntary departure periods. *Id.* at 8a, 12a; App., *infra*, 1a-4a. Petitioners filed additional petitions for review with the Second Circuit challenging

---

the Southern District of New York states that the government has agreed "not to deport or return aliens in any case where the Clerk's office has informed the U.S. Attorney that a stay motion has been filed, until and unless the motion for stay is denied." On January 26, 2007, the Director of the Department of Justice's Office of Immigration Litigation (OIL), which on May 15, 2006, assumed primary responsibility for the government's representation in immigration matters filed with the Second Circuit, wrote a letter to Chief Judge Jacobs stating that "OIL has adhered to the practices described in the September 5, 1995 memorandum since it began its transition to Second Circuit work last May" and that it would continue to do so absent further notice.

Neither the 1995 memorandum nor the 2006 letter states that the period during which an alien may depart voluntarily will automatically cease to run after a motion for a stay of removal is filed, or that the government undertakes to give a stay motion that effect. Neither, in fact, makes any reference to voluntary departure. The government did not argue below that the court of appeals' failure to enter a stay order in this case, or the nature of the memorandum and letter addressing departure after a stay motion has been filed in the Second Circuit, precluded a holding that petitioners' voluntary departure periods had been suspended. Those unusual features of stay practice in the Second Circuit would, however, detract from the suitability of this case for review by this Court, even if, contrary to our submission, the question presented otherwise warranted such review

the BIA's denials of their motions to reopen. Pet. 6; Pet. App. 8a.

3. A unanimous panel of the court of appeals denied the petitions for review in a published opinion. Pet. App. 1a-22a.[7] The court of appeals rejected petitioners' contention that the IJ had erred in denying their requests for asylum and withholding of removal, *id.* at 8a-11a, and noted that they "ha[d] not sought review" of the IJ's rejection of their claims under the Convention Against Torture, *id.* at 11a n.5.

The court of appeals then turned to petitioners' contention that the BIA had abused its discretion in denying their motions to reopen their removal proceedings. Pet. App. 12a. Concluding that petitioners' voluntary departure periods had started to run when the BIA affirmed the IJ's decision, *id.* at 12a-14a, it determined that petitioners were "barred from adjusting their status unless the period for voluntary departure was stayed, tolled, or otherwise extended by their having filed for a stay of [removal]" on December 26, 2002, *id.* at 14a.

Reiterating its earlier holding in *Thapa* v. *Gonzales*, 460 F.3d 323 (2d Cir. 2006), the court of appeals concluded that it "ha[d] the *authority* . . . to stay an agency order [of voluntary departure] pending . . . consideration of a petition for review on the merits." Pet. App. 15a (emphasis added; brackets in original)

---

[7] The panel issued its original opinion (Pet. App. 23a-41a) on September 11, 2006. *Id.* at 23a. After petitioners sought rehearing, the panel issued an amended opinion (*id.* at 1a-22a) that, *inter alia*, addressed the fact that "[d]uring the course of this appeal, Congress repealed the IIRIRA transitional rules" that had barred judicial review of removal orders in situations where an alien had already been removed. *Id.* at 2a-3a.

(quoting *Thapa*, 460 F.3d at 324-325). The court acknowledged that other courts of appeals had "held that where an alien files a motion to stay removal before the period for voluntary departure expires, such a motion should be construed as including a motion to stay the voluntary departure period." *Ibid.* (citing *Desta* v. *Ashcroft*, 365 F.3d 741, 743 (9th Cir. 2004), and *Rife* v. *Ashcroft*, 374 F.3d 606, 616 (8th Cir. 2006)). But the court of appeals stated that it "disagree[d]" with these decisions and "join[ed] the First and Seventh Circuits" in deciding that "an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." *Ibid.* (citing *Bocova* v. *Gonzales*, 412 F.3d 257, 268 (1st Cir. 2005), and *Alimi* v. *Ashcroft*, 391 F.3d 888, 892-893 (7th Cir. 2004)).

"The relief sought by a stay of [removal]," the court of appeals reasoned, "is different from that sought by a stay of voluntary departure." Pet. App. 17a. Whereas a stay of removal "prevent[s] the forced removal of an alien from the country," which "may end up returning an alien to the very persecution he or she was fleeing in the first place," "[v]oluntary departure * * * is a privilege granted an alien in lieu of [removal]" that "affords [the] alien certain benefits." *Id.* at 16a. When a court "stops the clock on the period within which an alien is required to depart," it "effectively extends the time during which an alien is allowed to leave voluntarily" and to reap the benefits of having done so. *Id.* at 17a. As a result, "the equities involved in the two types of stays may also differ," *id.* at 18a (citing *Rife*, 374 F.3d at 616), and "the Government deserves prompt notice of precisely what relief a petitioner seeks," *id.* at 18a n.8. Indeed, the court of appeals stated that providing such notice "is a petitioner's responsibility" under Federal Rule of Appel-

late Procedure 18(a)(2)(B)(i). Pet. App. 18a n.8. Here, it noted, petitioners not only "styled their motion as [seeking] a 'stay of deportation,'" their moving papers stated that, absent a stay, they were "subject to being *physically deported* from the United States." *Ibid.* (internal quotation marks and citation omitted). Because "the reasons offered by Petitioners for granting their stay were aimed at deportation rather than their period for voluntary departure," they "failed to give appropriate notice that they sought relief in the form of voluntary departure." *Ibid.*

Having decided that it would not construe petitioners' motions for a stay of deportation automatically to include a stay of the period for voluntary departure, Pet. App. 18a-19a, the court of appeals also declined to "adjudicate a stay of voluntary departure *nunc pro tunc*," *id.* at 19a. Although the court was "sympathetic to the position Petitioners find themselves in," it concluded that "this is not a case in which error on the part of the court or the INS put Petitioners in a worse position." *Id.* at 20a. Noting that petitioners' immediate relative petitions had already been approved at the time the BIA affirmed the IJ's decision and granted them an additional 30 days to depart the country, the court of appeals stated that petitioners "had several options * * * [that] might have preserved their privilege to depart voluntarily," including: (1) filing motions to adjust their status before the voluntary departure periods expired; (2) seeking an extension of their voluntary departure periods from the appropriate INS official; or (3) filing timely applications for stays of voluntary departure with the court of appeals. *Ibid.* The court also stated that this case was unlike *Desta* or *Rife*, because nothing in the Second Circuit's prior decisions could have "misled"

petitioners into believing "that they did not have to file a motion specifically seeking a stay of voluntary departure." *Id.* at 20a-21a.

Finally, the court of appeals observed that "Petitioners may not be without a remedy." Pet. App. 21a. "Under pre-IIRIRA regulatory authority," it noted, "the INS District Director (now the appropriate Field Office Director, U.S. Immigration Customs Enforcement, Department of Homeland Security) may grant a *nunc pro tunc* extension of voluntary departure." *Id.* at 21a-22a (citing 8 C.F.R. 1240.57). Citing petitioners' age, lack of criminal history, United States citizen daughter, and the fact that "any delay on Petitioners' part may be attributable to counsel's failure to recommend that they seek to extend their voluntary departure period before overstaying that period," the court of appeals expressed the view that "the INS District Director might well consider exercising his or her discretion to grant an extension so that Petitioners may adjust their status to lawful permanent residents." *Id.* at 22a.

ARGUMENT

Petitioners contend (Pet. 10-27) that the Second Circuit's decision that a motion for a stay of removal will not be deemed automatically to encompass a motion to stay voluntary departure is erroneous and conflicts with the decisions of other courts of appeals. Although the courts of appeals have taken different approaches to this issue of stay practice, this Court's review is not warranted. The question presented involves an exceedingly narrow issue of judicial procedure involving the proper interpretation of documents filed with the courts of appeals themselves, not a question of substantive immigration law. In addition, the Second Circuit's position is

reasonable and works no injustice to the particular petitioners in this case.

1. The question presented is a narrow one. All but one of the courts of appeals to have considered the question have held that they have the authority to stay a period of voluntary departure[8]—although those holdings are difficult to square with the strict statutory limitations now applicable to that substantive relief and the foreclosure of judicial review of issues concerning voluntary departure, see 8 U.S.C. 1229c(b)(2) ("Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days."); 8 U.S.C. 1229c(f) (providing that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure" and barring a court from "order[ing] a stay of an alien's removal pending consideration of any claim with respect to voluntary departure"). See Resp Br. at 5-8, 19-20, 35-36, *Dada* v. *Mukasey*, cert. granted, No. 06-1181 (to be argued Jan. 7, 2008).[9] At the same time, every court of

---

[8] See *Bocova* v. *Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005); *Thapa* v. *Gonzales*, 460 F.3d 323, 325 (2d Cir. 2006); *Obale* v. *Attorney Gen.*, 453 F.3d 151, 157 (3d Cir. 2006); *Vidal* v. *Gonzales*, 491 F.3d 250, 252 (5th Cir. 2007); *Nwakanma* v. *Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Rife* v. *Ashcroft*, 374 F.3d 606, 615-616 (8th Cir. 2004); *El Himri* v. *Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003). In contrast, the Fourth Circuit has held that it lacks the power to stay a period of voluntary departure. *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (2004). *Ngarurih*, however, involved an alien petitioner who asked the court of appeals to "reinstate" a period of voluntary departure that had already expired at the time the request was made. See *id.* at 187, 191. As explained below, no court of appeals has held that it may grant a stay of voluntary departure in such circumstances.

[9] As noted above, petitioners are subject to the pre-IIRIRA provisions governing voluntary departure. This feature of the case

appeals that has squarely confronted the question has held that it lacks the authority to stay or reinstate a voluntary departure period that has already expired at the time the initial request is made.[10] And even assuming that judicial stays of the voluntary departure period are sometimes permissible under the current statutory and regulatory scheme, this case does not involve the substantive standards a court should use in determining whether such a stay should be granted. See Pet. i.

Instead, the question presented by the petition for a writ of certiorari (Pet. i) is whether a court of appeals is *required* to construe *every* motion that seeks a stay of removal as "necessarily * * * includ[ing] a request to stay the running of [a] voluntary departure period," regardless of whether the motion itself seeks such relief. As petitioners note (Pet. 11-13), three courts of appeals have concluded that, given their "equitable power to construe motions broadly," circuit law regarding the substantive standards for granting stays of removal and stays of voluntary departure, and those courts' respective assessments of the likelihood that an alien who seeks one kind of judicial relief would also desire the other, it is most reasonable to "construe" all timely motions that seek a stay of removal"as including a timely motion to stay voluntary departure." *Desta*, 365 F.3d at

---

further undermines its suitability for review by this Court, even if the particular issue concerning stay practice in the courts of appeals might otherwise warrant review by this Court at some point. See also note 6, *supra*.

[10] See *Bocova*, 412 F.3d at 266; *Reynoso-Lopez* v. *Ashcroft*, 369 F.3d 275, 280-281 (3d Cir. 2004); *Ngarurih*, 371 F.3d at 192-193; *Mullai* v. *Ascroft*, 385 F.3d 635, 639-640 (6th Cir. 2004); *Rife*, 374 F.3d at 616; *Sviridov* v. *Ashcroft*, 358 F.3d 722, 731 (10th Cir. 2004). The Ninth Circuit has reserved the question. *Desta*, 365 F.3d at 745-746.

748-749; see *Rife*, 374 F.3d at 616 (endorsing *Desta*'s analysis but "leav[ing] * * * for the future" whether "every alien who warrants a stay of removal also warrants a stay of voluntary departure"); *Macotaj* v. *Gonzales*, 424 F.3d 464, 466-467 & n.1 (6th Cir. 2005). In contrast, three courts of appeals have determined that for a variety of reasons, including the different consequences of a stay of removal and a stay of voluntary departure, the fact that the equities may differ with respect to each form of relief, and the interest in affording notice to both the government and the court of precisely what relief a petitioner is seeking, it is most appropriate to require aliens to specify if they are seeking a stay of a voluntary departure period. Pet. App. 15a-19a; *Bocova*, 412 F.3d at 268-269; *Alimi* v. *Ashcroft*, 391 F.3d 888, 891-893 (7th Cir. 2004).

These different approaches to stay practice in the courts of appeals do not warrant this Court's review. Petitioners assert (Pet. 8-9) that the circuits' differing approaches generate "intolerable inconsistency" and will result in aliens in some circuits being "expelled from the country" while otherwise identically situated aliens in other circuits will be permitted to remain. But any variation in local procedural rules or practices in the courts of appeals could have that incidental effect. This Court is not required (Pet. 17-18) to insist on uniformity in areas that involve not the substantive requirements for obtaining immigration relief, but rather the stay practices in individual circuits and the manner in which the courts may choose to construe documents filed with them. See *Thomas* v. *Arn*, 474 U.S. 140, 142 (1985) (holding that a court of appeals "may exercise its supervisory powers to establish a rule that the failure to file objections to [a] magistrate's report waives the right to

appeal the district court's judgment"); *id.* at 146 ("It cannot be doubted that the courts of appeals have supervisory powers that permit * * * the promulgation of procedural rules governing the management of litigation.").

Notwithstanding petitioners' contention to the contrary (Pet. 18-20), the proper resolution of the question presented is of little practical significance, and the number of cases affected by it is likely already diminishing significantly. Assuming that an alien is genuinely interested in obtaining both forms of relief, it is difficult to see any non-strategic reason why the alien would not expressly seek both a stay of removal and a stay of a voluntary departure period. Far from being "burdensome" (Pet. 14), the effort required to caption a filing as a Motion for Stay of Removal and Stay of Voluntary Departure rather than simply a Motion for Stay of Removal, and to make appropriate arguments with respect to each, is minor. And once a particular circuit has announced whether it will construe all motions for a stay of removal as also encompassing a request for a stay of the voluntary departure period, aliens filing petitions for review within that circuit are on full notice of what actions they must take to protect their rights.

2. There is an additional reason why review in not warranted in this case. On November 30, 2007, the Attorney General issued a proposed rule addressing a number of issues related to voluntary departure. 72 Fed. Reg. 67,674 (2007). The proposed rule would, *inter alia*, expressly provide that an alien's filing of a motion to reopen or reconsider with the Board "prior to the expiration of the voluntary departure period will have the effect of automatically terminating the grant of voluntary departure." *Ibid.* The filing of a petition for review

with a court would have the same effect. *Ibid.* As a result, an alien who previously had agreed to depart voluntarily within the time specified in the BIA's order, and thereby to forgo any further dispute over his continued presence in this country, would be given the opportunity to withdraw from that agreement, file a motion to reopen with the BIA or petition for review with a court in an effort to obtain the ability to remain, and avoid the penalties for overstaying his voluntary departure period if he chose to remain in the country until the BIA or the court ruled.

Because, under the proposed rule, the filing of a petition for review (and any related motion for a stay of removal) would terminate the permission for the alien to depart voluntarily, the question presented in this case—whether the filing of a motion to stay removal also should be deemed to include a request to stay the running of the voluntary departure period—would not arise. Of course, upon termination of the permission to depart voluntarily, the alien would then be subject to removal under the alternate order of removal in the BIA's order, as well as the attendant consequences of removal, unless the alien in fact obtained a stay of removal pending further review from the BIA or the court.

The proposed rule would "app[ly] prospectively only, that is, only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure." 72 Fed. Reg. at 67,682. But the rule, if it becomes final, would further diminish the prospective significance of the issue in this case.

3. This Court's review is likewise unwarranted because the Second Circuit's decision is sound and reasonable and works no unfairness in this particular case.

Federal Rule of Appellate Procedure 18(a)(2)(B)(i) requires a party seeking a stay of agency action pending judicial review to identify "the reasons for granting the relief requested and the facts relied on." As the court of appeals explained (Pet. App. 16a-18a), a stay of removal is a substantively different form of relief than a stay of a voluntary departure period, and the equitable considerations regarding stays may play out differently with respect to each. "Voluntary departure confers substantial benefits compared with involuntary removal, and this difference provides an incentive to depart without dragging out the process and without requiring the agency and courts to devote resources to the matter." *Alimi*, 391 F.3d at 892. Accordingly, unlike when an alien seeks only a stay of removal, when an alien seeks a stay of a voluntary departure period, a court must consider "whether it is appropriate for [it] to obliterate any incentive to abandon the litigation." *Ibid.*

In addition, because the volume of immigration cases is enormous and because "stays usually require expedited judicial consideration," courts of appeals may reasonably see a "need for both the government and the court to understand exactly what relief the movant is seeking." *Bocova*, 412 F.3d at 268. Regardless of whether it is truly "inconceivable" (Pet. 23) that an alien who seeks a stay of removal would not also seek a stay of a voluntary departure period,[11] the same statistics

---

[11] Although it is not the claim on which they seek review, petitioners err in suggesting (Pet. 25-26) that there is a constitutionally based right to effective assistance of counsel in removal proceedings that may warrant excusing an alien's failure to make a timely and procedurally proper request for a stay of voluntary departure. An alien in removal proceedings has a statutory right to be represented by counsel of the

petitioners cite demonstrate that IJs grant voluntary departure in only 10% of all removal cases.[12] As even

---

alien's choice at no expense to the government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the United States Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), the Court held that, when the Constitution does not require the government to provide counsel, the ineffectiveness of privately retained counsel is not attributable to the government and does not violate the Constitution. *Id.* at 754; see *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of criminal conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant * * * is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007); *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). Thus, although a number of courts of appeal, including the Second and Ninth Circuits (Pet. 25-26), have held that an alien has a constitutionally based claim of ineffective assistance of counsel in removal proceedings, this Court's decisions do not support that proposition.

[12] See Executive Office for Immigration Review, United States Dep't of Justice, *FY 2006 Statistical Yearbook* at Q1, table 14 (Feb. 2007)

courts that have taken a different approach than the Second Circuit in construing stay motions have acknowledged, the government's decision about whether to oppose a stay may depend in part on whether an alien seeks only a stay of removal or also seeks a stay of a voluntary departure period as well, *Desta*, 365 F.3d at 741, and a court's assessment about whether to grant a stay may at least sometimes vary depending on the form of relief the alien is seeking, *Rife*, 374 F.3d at 616.

Nor does the Second Circuit's decision in this case result in any unfairness to petitioners. As the court of appeals explained (Pet. App. 20a), "this is not a case in which error on the part of the court or the INS put [p]etitioners in a worse position."[13] In addition, petitioners "had several options"—including filing motions to adjust their status before their voluntary departure pe-

---

<http://www. usdoj.gov /eoir/statspub/fy06syb.pdf>.

[13] Nor is *Foti* v. *INS*, 308 F.2d 779 (2d Cir. 1962) (en banc), rev'd, 375 U.S. 217 (1963) (Pet. 16), to the contrary. The question at issue in *Foti* was whether the Attorney General's discretionary decision to deny an application for suspension of deportation constituted a "final order of deportation," judicial review of which was authorized under former 8 U.S.C. 1105a. Responding to the contention that an affirmative answer was necessary to conform to Congress's intent "to create a single, separate statutory form of judicial review," Judge Friendly stated that even the dissenting opinion would recognize at least one departure from that ideal: "After an automatic stay and ultimate adverse decision by us, the deportee, unless he voluntarily departs, can have another although more limited fling in the district court, by *habeas corpus*, once he is taken into detention." *Foti*, 308 F.2d at 783-784. But "automatic stay[s]" of removal were abolished in 1996, see IIRIRA, § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(a)(3) (1994)), and nothing in the statement in *Foti* reasonably could have led an alien to conclude that a motion for a stay of removal necessarily encompasses a motion for a stay of voluntary departure.

riods expired, seeking extensions of their voluntary departure periods from the appropriate INS official, or filing timely motions for stays of their voluntary departure periods with the court of appeals—that "might have preserved their privilege to depart voluntarily." *Ibid.*

Finally, the court of appeals noted (Pet. App. 21a) that, even at this late date, "Petitioners may not be without a remedy," because they could seek to have the appropriate DHS official "grant a *nunc pro tunc* extension of voluntary departure" under the pre-IIRIRA law that governs this case. Petitioners have made no representation to this Court that they followed up on that suggestion, and a review of their files with DHS does not reveal any document requesting extensions (nunc pro tunc or otherwise) of their voluntary departure periods. Further review by this Court is not warranted.

4. Petitioners have not asked this Court to hold the petition for a writ of certiorari pending its decision in *Dada* v. *Mukasey*, cert. granted, No. 06-1181 (to be argued Jan. 7, 2008), and there is no need to do so. As formulated by the Court, the question presented in *Dada* is: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." Because petitioners filed their motions to reopen their removal proceedings after the permission for them to depart voluntarily had already expired, see pp. 6-7, *supra*, there was nothing left to toll. In addition, because motions to reopen removal proceedings are filed with entities that have the power to grant voluntary departure in the first place (an IJ or the BIA), whereas motions of the sort at issue in this case are filed with a court, even a holding in Dada's favor would not help petitioners here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

DECEMBER 2007

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-033-322- NEW YORK Date: [May 29, 2003]

In re: IOURI, VLADIMIR

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Kogan, Irina, Esquire

ON BEHALF OF SERVICE:
Susan Egan, Assistant District Counsel

ORDER:

PER CURIAM. This case was last before us on November 27, 2002, when this Board dismissed the respondent's appeal from an Immigration Judge's decision. The respondent has now filed a motion to reopen. The motion will be denied.

Pursuant to section 240B(d) of the Act, 8 U.S.C. § 1229c(d), an alien who fails to depart following a grant of voluntary departure, and who has been provided writ-

ten notice of the consequences of remaining in the United States, is statutorily barred from applying for certain forms of discretionary relief. We find that the respondent is barred from applying for adjustment of status by section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d). An alien who remains in the United States after the scheduled date of departure is statutorily ineligible for discretionary relief. Therefore, because the respondent has remained in the United States after the scheduled date of departure, the respondent is now statutorily ineligible for the relief sought. Accordingly, the motion to reopen is denied.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-033-321- NEW YORK Date: [May 29, 2003]

In re: YURIY, VERA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Kogan, Irina, Esquire

ON BEHALF OF SERVICE:
Susan Egan, Assistant District Counsel

ORDER:

PER CURIAM. This case was last before us on November 27, 2002, when this Board dismissed the respondent's appeal from an Immigration Judge's decision. The respondent has now filed a motion to reopen. The motion will be denied.

Pursuant to section 240B(d) of the Act, 8 U.S.C. § 1229c(d), an alien who fails to depart following a grant of voluntary departure, and who has been provided writ-

ten notice of the consequences of remaining in the United States, is statutorily barred from applying for certain forms of discretionary relief. We find that the respondent is barred from applying for adjustment of status by section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d). An alien who remains in the United States after the scheduled date of departure is statutorily ineligible for discretionary relief. Therefore, because the respondent has remained in the United States after the scheduled date of departure, the respondent is now statutorily ineligible for the relief sought. Accordingly, the motion to reopen is denied.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-033-322 - NEW YORK Date: [Nov. 27, 2002]

In re: IOURI, VLADIMIR

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kozak, Felix

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and

Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-033-321 - NEW YORK Date: [Nov. 27, 2002]

In re: YURIY, VERA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Kozak, Felix

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and

Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
New York City, New York

File Nos.: A 73 033 322
A 73 033 321

IN THE MATTER OF
VLADIMIR IOURI, VERA IOURI, RESPONDENTS

IN REMOVAL PROCEEDINGS

July 6, 2000
[Filed: Dec. 8, 2000]

CHARGE: In each case, Section 241(a)(1)(B) - aliens who were in the United States beyond the authorized time without permission from Immigration Naturalization Service.

APPLICATIONS: Relief sought, Section 208, political asylum; Section 243(h), withholding of deportation to the Republic of the former Soviet Union. Withholding deportation as per Article 3, Convention Against

Torture and voluntary departure in the alternative.

ON BEHALF OF RESPONDENT:

Felix Kozak, Esquire

ON BEHALF OF SERVICE:

Virna Wright, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent's are respectably a 64-year-old male and 59-year-old female, natives of the former Soviet Union and citizens of Ukraine.

The male respondent entered as a visit for pleasure on April 4, 1993, authorized to remain in the United States until October 3, 1993.

The female respondent entered on August 3, 1993, authorized from then to February 2, 1994.

Application for political asylum was filed formally by the male respondent naming his wife. On August 27th, 1993, this application was considered after the reform of regulations of January 5, 1995; and when considered but not granted, it was referred to the Office of Immigration Judge by the issuance of the Order to Show Cause dated November 22, 1996, placing the respondents in deportation proceedings.

On July 17th, 1997, they were each found deportable as charged pursuant to Section 241(a)(1) of the Act, by evidence that was clear, convincing, and unequivocal.

The I-589 request for asylum, the attachment, and the addendums submitted in the context of these proceedings by their counsel, all serve as the applications for relief under Sections 208 and 243(h), and Article 3, Convention Against Torture.

There were also supporting documentation, which will be discussed in the context of this decision and it includes: a letter from the Russian Orthodox Church here in the United States; three certificates from the Ministry of Internal Affairs in the Ukraine in the area where they lived; A medical abstract from a hospital. These documents were not authenticated but were allowed into evidence, whatever weight they can be given. There were two birth certificates, one each for the respondents and their marriage certificate. Also, allowed into evidence, but given limited weight, was the INS assessment referral memo and notes.

The respondents testified, the male respondent, Vladimir testified first. He indicated that he's a member of the Ukrainian Orthodox Church. His daughter is in the United States as a lawful permanent resident and a review of her card indicates that she's been a permanent resident since 1998. She's been married to a U.S. citizen during that time so it appears that she would be eligible to apply for naturalization benefits within a year of this hearing.

Respondent says that after 1990, he did have problems because of his religion. Beginning in December of 1991 when he was walking home, three people followed him and beat him, causing him to be hospitalized for seven days.

It should be noted that this attack is not mentioned in his application or attachment, however, it is mentioned on Exhibit 2B as addendum to the application for political asylum. However, that addendum makes no mention of the need for seven days hospitalization after the attack. The respondent said his injuries included a scalp wound.

He says, from the remarks made to him by the attackers, he believes it was motivated because of his religion but could give very few other details regarding the motivation of the attackers. He did mention that there was a conflict between the Ukrainian and Russian Orthodox Church. But again, it is not clear that these attackers were anti-religion or members of the Russian faction who are against the Orthodox Ukrainian faction.

When asked how it is the attackers would have known that the respondent was active with the Ukrainian Orthodox Church, the respondent offered that he took part in periodic gatherings at his apartment. Implicit in that remark is that the attackers must have known about these gatherings. But again, it was not at all clear how it is they would have known what religion that he was associated with.

Respondent says that in March of 1992, attackers vandalized his house. He wasn't home at the time. Neighbors witnessed the act. There were crude words written on the wall regarding Ukrainian Orthodox, so the respondent believes that again this vandalization was motivated by religious purpose.

The most brutal attack took place in February 1993. The respondent explained he was home at the time, when three intruders came into the apartment, vandal-

ized the apartment and started brutally beating the respondent, causing severe injuries including a kidney injury and requiring hospitalization for approximately one month.

The respondent said that his wife contacted the police and a report was given but nothing else was done after the report was given.

The respondent said that when he was in the Ukraine, there were no Ukrainian Orthodox Churches open yet, although the background materials indicate that the Ukrainian Orthodox Church is now very large in the Ukraine.

The respondent says that in the United States, he does attend a church. He could not recall the name but does remember the pastor, Father Luplin, who is a Bulgarian. Other than that, he could not remember much about Exhibit 4 which actually was signed by another individual whose name the respondent did not originally recognize, and who indicates that he knew the respondent very well.

The stationary of Exhibit 4 is Russian Orthodox Church. The respondent was asked why he would attend a Russian Orthodox Church and he indicated that he would have to go somewhere. Although, based on his testimony, the information in the background materials, it is the Russian Orthodox with whom the Ukrainian Orthodox have a great deal of problems back in Ukraine.

On cross-examination, he was asked about the Ukrainian Orthodox being the largest denomination in Ukraine. The respondent acknowledge [*sic*] that that

may very well be the case now, but was not previous to the time that he was there.

He acknowledged that he was not exactly sure who assaulted him. He's not sure if he ever saw Exhibit 7 before. Exhibit 7 is the certificate from the Ministry of Internal Affairs referring to the last attack in 1993.

Just a parathetical note, that document indicates that in the translation that it was issued in April of 1994 but the interpreter advised us that the translation was in error and the document was issued in 1993. Again, I also note there was no mention of the hospitalization of the male respondent after this December 1991 attack.

The respondent Vera Iouri also testified and she was able to confirm that they did indeed attend the church listed in the letter at Exhibit 4. She was not able to shed too much additional light on why they would attend that church, in light of the situation in Ukraine; the conflict between the Orthodox Church loyal to the Moscow partriarch and the Orthodox Church loyal to the Kiev patriarch.

The respondent, Vera, did testify that her husband had problems throughout his life with regard to his religion after 1990.

She said that he was attacked on either February or December 1993. When it was indicated to her, she was able to acknowledge that he had actually left the country by April 1993, she indicated that the attack took place in February 1993.

She also indicated that he was hospitalized for one month after the February 1993 attack. Which is consistent with testimony given by the male respondent and

consistent with the addendum and evidence regarding the hospitalization.

However, she indicated that the hospitalization of February 1993, stemmed from an attack on him on the street, Carmen Street. That the respondent, Vera, was home at the time. That the respondent, Vladimir, staggered back to the apartment. He was so badly beaten and bleeding, but he did make it back to the apartment and the respondent, Vera, called for help.

Respondent was taken to the hospital. The respondent, Vera, indicated that the doctors had called the police in at that time, of course the respondent, Vladimir, had testified that his wife had notified the police to come and take a complaint.

It even was brought to her attention that the addendum and testimony of Vladimir, as well as Exhibit 7, all indicate that the attack on the respondent, Vladimir, took place in the apartment, not on Carmen Street.

Respondent, Vera, at first insisted that that attack on February of 1993 took place on the street. But then when it was brought to her attention that the document from the Ministry of Internal Affairs also made mention of the attack being made in the apartment, then the respondent changed her testimony and revealed there was an attack in December of 1992 and perhaps that was the one that took place on the street. Then the February 1993, indeed was an attack that took place in the apartment as the respondent Vladimir had stated.

Just to clarify that date, she was asked if December 1992, does she mean another attack took place several months before the February 1993 attack and she said

that there were. There were many attacks at or around that time.

But again, it should be noted that there is no evidence of a December 1992 attack. The male respondent did not testify to that effect. There's no mention of the December 1992 attack on the application for asylum or the addendum. The respondent acknowledged that she was confused and only knows that there was an attack back in 1993 and that her husband stayed in the hospital.

The Service has offered the assessment referral memo into evidence. It should be noted that except for the 1991 attack, there is no other information that specifically corroborates the respondent's claim as it's stated on his addendum and does not corroborate his claim that he told this exact story that's on his addendum to the asylum officer at the time of the interview.

However, I also note that I have some concerns between discrepancies in the notes of the assessment referral memo and the assessment referral memo. While I allowed it into evidence for when I weigh it, I intend to give Exhibits 12A and 12B very little weight in light of these discrepancies and the unavailability of the examiner to explain the discrepancies. While the document is in evidence, it will be given very little weight.

With regard to back material, we have the Department of State Country Reports and Human Rights Practices. A Profile from the Bureau of Democracy, Human Rights and Labor. Various background materials were offered to us by counsel for the respondents.

The respondents bear the evidentiary burden of proof and persuasion on both applications for political asylum

withholding of removal. *See* the Board's decisions in *Matter of Acosta* and *Matter of B-*. Respondents seeking withholding of removal must show that their life or freedom would be threatened in their country on account of one of the five enumerated grounds in the Act: race, religion, nationality, membership in a particular social group, or political opinions. Section 243(h)(1).

Respondents seeking withholding of deportation must show a clear probability of persecution. The standard is met by a showing of circumstances under which it is more probable than not that would suffer persecution. *See* Supreme Court decision in *INS v. Stevic*. Under the Refugee Act of 1980, withholding of deportation is mandatory. So once they've established eligibility for the relief and show that they are not ineligible under Section 243(h)(2) provisions, the relief must be granted and they cannot be returned to the country where they could face persecutions. *See Matter of Salim*. Under certain circumstances although, they could be returned to a third country. This mandatory aspect of Section 243(h) distinguishes it from political asylum, a discretionary grant under Section 208 of the Act.

Respondents seeking such a grant, must establish status of a refugee; the term is defined in Section 101(a)(42), as an individual with a willingness or inability to return to the country because of persecution or a well-founded fear of persecution on account of one of those five grounds: race, religion, nationality, social group, or political opinion.

This standard is met by a showing of circumstances under which a reasonable person would fear persecution. *See Matter of Mogharrabi*. And see the definition

of well-founded fear in the regulations under 8 C.F.R. 208.13, defining well-founded fear as a reasonable possibility of persecution on account of one of the five grounds.

The respondents must show that their fear is objectively reasonable, subjectively genuine. The objective component being met by what has happened to others who are similarly situated as reported in a variety of reliable sources including the aforementioned background materials that we placed into evidence in these proceedings, in accordance with the Board's decision in the *Matter of S-M-J-*.

Sometimes the only available evidence of the respondents' subjective fear is their own testimony. The Board in *Mogharrabi* said that this can suffice when such testimony is believable, consistent, and sufficiently detailed to provide us with a plausible and coherent account of the basis for that fear.

By consistency, the Board refers not only to internal consistency within the context of direct and cross-examination, but external consistency with information on the 1-589, request for asylum and any addendums; other documents in the record of proceedings, including the background material; prior sworn testimony and the sworn testimony of other respondents or witnesses in the proceedings. Credible testimony according to *Mogharrabi*, is also used in support of the objective component of the fear as well. But this reliance on testimony does not relieve the respondents' obligation to submit reliable documentary forms of evidence as the Board has warned in *Matter of Dass*, *Matter of S-M-J-*, *Matter of M-D-*, and *Matter of Y-B-*. When documen-

tary forms of evidence can be made available, they must be submitted.

Not just any fear of persecution will suffice to support the respondents' burden. The objectively, reasonable possibility of persecution on account of a grounds specified in Section 101(a)(42) of the Act, and the reasonably subjective fear of experiencing such persecution, both must be established. Once again, *See* the decision in the *Matter of Mogharrabi* and the Supreme Court decision in *INS v. Cardoza-Fonseca.*

If the respondents demonstrate a well-founded fear, they must show that they warrant the relief as a matter of discretion. They should present evidence on any positive factors warranting a discretionary grant, which include but are not limited to close family ties in the United States, which may have been the motivation for them to seek refuge here rather than in another country. *See* the Board decision in the *Matter of Pula.*

In the instant case, the respondents based their claim on religion. The male respondent claims that he was attacked on numerous occasions after Ukraine became independent from the former Soviet Union. He indicated that he was attacked and hospitalized in December 1991, that his apartment was vandalized in March of 1992, and that he was brutally attacked inside the apartment and hospitalized for one month in February of 1993. There is a medical document with regarding to that last hospitalization and there are three police reports which make reference to the attack.

Again the documents were allowed into evidence because this is an asylum relief hearing, but I intended to give them relatively little weight.

Not only do they lack any independent verification or authentication, but the police documents in particular, seem to be composed of hearsay type information. Whether the police were recording what was given to them as opposed to information gathered through independent police investigation and fact finding. Again, while this does not affect the admissibility of the document into evidence, it does affect what weight it can be given. Because it is not clear from those documents what efforts the police made, if any to verify the facts that were being given to them.

I'll note that the older reports were made after the events referred to, sometime significantly after. For instance, Exhibit 7, which is the certificate from the Ministry of Internal Affairs, is dated April 1993 but makes reference to an event that happened two months prior. For these reasons these documents were given relatively little weight.

But we did have the testimony of the respondents. As indicted, creditable testimony is used for support of both the objective and subjective components of the claim. Unfortunately, for the reasons stated below, I made a negative credibility finding in this case.

First of all, referring to the testimony of the male respondent, Vladimir, I do know that he's now 64 years of age. He's not very familiar with proceedings as conducted here in the United States. Of course that should be weighed when considering the manner of testimony. However, even taking this into consideration, I found that the testimony was generally halting and vague with regards to some significant events. There was a significant discrepancy, he stated he was attacked in Decem-

ber 1991 and hospitalized for one week. There is no mention of this anywhere. Nothing on his application for asylum or the attachment. Nothing on the addendum and there's no documents to corroborate that he was indeed hospitalized in December 1991.

He was very vague on the tenets of his religion, the principles of his religion. Very vague with regard to the source of the conflict between the Orthodox Church in Ukraine, loyal to the Kiev patriarch and that which is loyal to the Moscow patriarch. He was very vague on the attacks. The details of the attack. Who attacked him? What motivation they would have to attack him? Were they from this Russian Orthodox Church with which his denomination was in conflict with? Were they really fascists or anti-religious? None of this was ever made clear.

Also, neither the male respondent nor the female respondent made clear as to why they would be attending an Orthodox Church which appears to be loyal to the Moscow patriarch here in the United States, when this was a source of contention for them while they were living in Ukraine.

We also have some serious discrepancies with regard to the testimony of the respondent, Vera. More specifically, she indicated that the most brutal attack in February 1993 took place on the street and the respondent staggered home, and she was home at the time.

While the male respondent indicated that he was home without his wife being there and he was attacked in the apartment not outside the apartment. The respondent, Vera, insisted that these were the facts until it was brought to her attention that even the report that

she and her husband submitted, indicates that he was attacked in the apartment. Then she indicated that the attack she was referring to took place in December of 1992 and she confused the two events. But no where in the record proceedings is it indicated that there was an attack on her husband in December of 1992. There's no evidence, it's not in the addendum, it's not on the application for political asylum and respondent, Vladimir, did not testify to such an attack.

Again, for all the reasons: the internal discrepancies, the external inconsistencies with information on documents and the addendum to the I-589 request for asylum, the general vagueness of the testimony, the lack of key details and specifics with regard to the most critical portions of the claim, and the significant discrepancies between the testimony of the two respondents; for all these reasons, I find that the testimony does not rise to that level of believability and consistency in detail to provide us with a plausible and coherent account of the basis for the fear, and for that reason a negative credibility finding is made for each respondent.

This negative testimony weighed in context with the documents that I was able to give relatively little weight to, lead me to find that in the aggregate, the evidence is [*sic*] not support finding of past persecution or a well-founded fear of future persecution to the respondents based on their religious beliefs or religious affiliations.

Because they have not met the well-founded fear standard, I must also find that they have not met their burden of a clear probability required for relief under Section 243(h) of the Act. There is no evidence or testimony in the record of proceedings that would lead me to

believe that it is more likely than not that they would be tortured by the Ukrainian Government for any reason including reasons beyond the five enumerated grounds of the Act.

In lieu of deportation they have sought voluntary departure, indicating that they have never committed any crimes and would be ready, willing, and able to leave the United States pursuant to an order of voluntary departure. This relief has been granted to them as a matter of discretion.

The following order will be entered:

ORDER

IT IS ORDERED that the respondent's application under Sections 208, and 243(h), and Article 3, Convention Against Torture herein be denied.

IT IS ORDERED that the respondent's be granted voluntary departure until February 6th, 2001, or any extension that may be granted by the Board of Immigration Appeals or the Immigration and Naturalization Service.

IT IS FURTHER ORDERED that if they fail to depart when and as required, the order granting voluntary departure shall be withdrawn without further notice or proceedings: the respondents instead shall be ordered deported from the United States to Ukraine on the charges contained in the Order to Show Cause.

/s/ PHILIP MORACE
PHILIP MORACE
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before PHILIP MORACE, in the matter of:

VLADIMIR IOURI AND VERA IOURI

A 73 033 322/321

New York City, New York

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ MADELYN BARTLETT
MADELYN BARTLETT
(Madelyn Bartlett, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

January 3, 2001
(Completion Date)

95

FILED
JUN 17 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 07-259

In the Supreme Court of the United States

VLADIMIR IOURI AND VERA YURIY,

Petitioners,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

IRINA KOGAN
1612 Avenue Y
Brooklyn, NY 11235

Counsel for Petitioners

TABLE OF AUTHORITIES

Page(s)

CASES

Dada v. *Mukasey*,
No. 06-1181, 554 U.S. __ (June 16, 2008) ...*passim*

PETITIONERS' SUPPLEMENTAL BRIEF

This Court recently decided *Dada* v. *Mukasey*, No. 06-1181, 554 U.S. __ (June 16, 2008). Although *Dada* did not address the precise issue presented here, the opinion nonetheless casts further doubt on the resolution of this case by the court of appeals. Moreover, in *Dada*, this Court specifically reserved an issue raised by this case—whether the courts of appeals have authority to stay voluntary departure pending appellate review. Accordingly, certiorari should be granted to consider this matter on the merits. In the alternative, and at the very least, the Court should grant the petition, vacate the decision below, and remand the case for further consideration in light of *Dada*, so that the court below has an opportunity to reconsider the matter in light of this Court's decision.

The petition for certiorari in this case presents the question whether a motion to stay deportation necessarily includes a motion to stay voluntary departure. Pet. i. The court of appeals here held that it does not and therefore affirmed the BIA's decision to deny petitioners' request to reopen the removal proceedings against them, reasoning that petitioners could not obtain relief because they had overstayed their voluntary departure period. *Id.* at 6-8. If the motion to reopen had been granted, petitioners would have automatically obtained legal status in the United States because their immediate relative petitions *were already approved* by the agency. In so deciding this case, the court below agreed with two other circuits. *Id.* at 10-11. But three courts of appeals disagree, and would have provided relief to the petitioners. *Id.* at 11-13.

Dada supports petitioners' argument that the court of appeals wrongly decided this question.

First, in holding that the "[b]enefits to the alien from voluntary departure are evident" (*Dada*, slip op. at 8), the Court's analysis confirms petitioners' argument that a reasonable alien—assisted by effective counsel—would *never* voluntarily forego a stay of voluntary departure when pursuing an appeal from the BIA to the circuit court, unless he or she was required to do so in order to pursue a motion to reopen (Pet. 21-23). *Dada*, therefore, casts further doubt on the Second Circuit's holding. That is especially so because, as the Court noted, "[i]t is foreseeable, and quite likely, that the time allowed for voluntary departure will expire long before the BIA issues a decision on a timely filed motion to reopen. * * * These practical limitations must be taken into account." *Dada*, slip op. at 14.

In addition to calling into question the holding below, *Dada* suggests additional reasons why the Court might wish to grant review in this case. *Dada* noted the frequency with which voluntary departure is granted, highlighting the significance of the question presented here. Slip. op. at 14. To the extent that a substantial number of individuals granted voluntary departure will petition for further review before the courts of appeals, the question presented will continue to recur frequently until definitively resolved by this Court. Moreover, as we explain in the petition (Pet. 4, 11 n.3), this case implicates a conflict in the circuits—specifically noted in *Dada*, at slip op. 8—on whether the courts of appeals have *any* authority to stay voluntary departure during the pendency of an appeal from the BIA. The Court declared in *Dada* that it would "leave * * * resolution" of this issue "for another day." *Ibid.* A grant of review in this case would present the Court with an opportunity to resolve that disagreement.

For these reasons and those presented in the petition, the petition for a writ of certiorari should be granted. In the alternative, the petition should be granted, the judgment below vacated, and the case remanded for further proceedings consistent with this Court's decision in *Dada*.

Respectfully submitted.

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

IRINA KOGAN
1612 Avenue Y
Brooklyn, NY 11235

Counsel for Petitioners

JUNE 2008

FILED
DEC 2 6 2007
OFFICE OF THE CLERK
SUPREME COURT U.S.

(3)

No. 07-259

In the Supreme Court of the United States

VLADIMIR IOURI AND VERA YURIY,

Petitioners,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

IRINA KOGAN
1612 Avenue Y
Brooklyn, NY 11235

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Question Presented Requires Interpretation Of Federal Immigration Statutes And Regulations. 2

B. Resolution Of The Question Presented Applies Broadly To Thousands Of Immigration Cases Every Year. 4

C. The Second Circuit's Rule Is Inefficient And Unfair. 5

D. The Attorney General's Issuance Of A Proposed New Regulation Regarding Voluntary Departure Provides No Basis For Denying Review In This Case. 7

E. If the Court Does Not Grant Review, It Should Hold This Case Pending Disposition Of No. 06-1181, *Dada* v. *Mukasey*. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Alimi v. *Ashcroft*, 391 F.3d 888 (7th Cir. 2004) 3
Baena v. *Gonzales*, 235 Fed. App'x 646 (9th Cir. Aug. 22, 2007) 5
Bocova v. *Gonzales*, 412 F.3d 257 (1st Cir. 2005) 2
Castillo-Perez v. *I.N.S.*, 212 F.3d 518 (9th Cir. 2000) 7
Dada v. *Mukasey*, No. 06-1181 ..... 10, 11
Desta v. *Ashcroft*, 365 F.3d 741 (9th Cir. 2004) 3, 4, 7
Elia v. *Gonzales*, 431 F.3d 268 (6th Cir. 2005) 1
Foti v. *INS*, 308 F.2d 779 (2d Cir. 1962) 6
Kanivets v. *Gonzales*, 424 F.3d 330 (3d Cir. 2005) 11
Matter of Lozada, 19 I. & N. Dec. 637 (BIA 1988) 7
Macotaj v. *Gonzales*, 424 F.3d 464 (6th Cir. 2005) 7
Massachusetts Trustees v. *United States*, 377 U.S. 235 (1964) 10
Obale v. *Att'y Gen.*, 453 F.3d 151 (3d Cir. 2006) 7
Onikoyi v. *Gonzales*, 454 F.3d 1 (1st Cir. 2006) 1
Rabiu v. *I.N.S.*, 41 F.3d 879 (2d Cir. 1994) 7
Saakian v. *I.N.S.*, 252 F.3d 21 (1st Cir. 2001) 7
Sidikhouya v. *Gonzales*, 407 F.3d 950 (8th Cir. 2005) 11

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, RULES AND REGULATIONS

8 U.S.C.]§ 1229c 3
8 U.S.C. § 1252(b)(3)(B) 3
8 C.F.R. § 1003.2(f) 11
8 U.S.C. § 1182(a)(9)(A) & (B) 9
8 U.S.C. § 1229c(b)(2) 9
8 U.S.C. § 1229c(f) 4
8 C.F.R. § 1240.26(d) 2, 3
58 Fed. Reg. 6074-01 (Jan. 25, 1993) 9
66 Fed. Reg. 7702-01 (Jan. 20, 2001) 9
72 Fed. Reg. 67,674 (2007) 8, 9
72 Fed. Reg. 67,686 (2007) 9

MISCELLANEOUS

Dan Eggen, *Immigration Backlog Forces Justice to Shift Staffing: Hundreds of Lawyers Being Reassigned to Deal With More Than 4,000 Appeals in New York City*, Washington Post, Dec. 14, 2004 10

U.S. Department of Justice, Executive Office of Immigration Review, *FY 2006 Statistical Year Book* (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. 4

PETITIONERS' REPLY BRIEF

The government acknowledges the sharp conflict in the courts of appeals on the question presented in the petition, recognizing that the decision below accords with holdings of the First and Seventh Circuits and directly conflicts with holdings of the Sixth, Eighth, and Ninth Circuits. Opp. 11, 13-14. The government does not dispute that if petitioners had sought review in the Sixth, Eighth, or Ninth Circuits, today they would be lawful permanent residents of the United States. But because petitioners' case instead was decided in the Second Circuit, they are now subject to expulsion from the country. This Court should not tolerate such inconsistency in the application of the Nation's immigration laws.

The hodgepodge of makeweight reasons the government offers to deny review in the face of this circuit conflict are insubstantial.[1] First, as the courts of appeals have expressly acknowledged, the question presented is a substantive issue that turns on application of both statutory and regulatory immigration law. It thus involves far more than the trivial variation in the motions practices of the courts of appeals described by the government. Second, resolution of

---

[1] The government's contention that this case is "unsuitab[le] for review" because it was initiated prior to enactment of IIRIRA (Opp. 12 n.9) is mistaken. The government does not dispute that the REAL ID Act of 2005 repealed the IIRIRA "transitional rules," rendering "pre-IIRIRA" cases indistinguishable from post-IIRIRA cases. See Pet. 4-5. The lower courts uniformly recognize that such cases are identical. See, *e.g.*, *Onikoyi* v. *Gonzales*, 454 F.3d 1, 3 (1st Cir. 2006); *Elia* v. *Gonzales*, 431 F.3d 268, 272 (6th Cir. 2005). It is beyond dispute that resolution of the question in this case would be broadly applicable to all immigration cases, whether initiated before or after passage of IIRIRA.

the question presented is broadly relevant to the outcomes of hundreds, if not thousands, of cases every year. Additionally, despite the government's contrary assertion, the Second Circuit's decision works great unfairness on petitioners and other similarly situated litigants. Finally, the proposed regulation relating to voluntary departure cited by the government provides no basis for denying review. It conflicts directly with statutory law, is inapplicable to this case, and in any event would not affect the resolution of the many cases that might present this issue that currently are pending before the courts of appeals. Review in this case is therefore warranted.

A. The Question Presented Requires Interpretation Of Federal Immigration Statutes And Regulations.

Contrary to the government's characterization of this case as involving an issue of mere stay practice (Opp. 11, 14), the question presented implicates both statutory law and federal regulations, and at its core concerns a conflict in the interpretation of the purpose of voluntary departure.

1. As we have explained (Pet. 21-23), voluntary departure and removal are complimentary facets of the same administrative order. See *Bocova* v. *Gonzales*, 412 F.3d 257, 267 (1st Cir. 2005). A motion to stay *removal* filed during the period for *voluntary departure* is therefore directed *at* the voluntary departure order – which, at that point, is the only order operating upon the alien. The question presented here therefore directly implicates both statutory law and federal regulations: it asks whether a motion filed under Section 304 of IIRIRA, 8 U.S.C. § 1252(b)(3)(B), to "stay the *removal* of an alien" necessarily also functions as a request to stay voluntary

departure, given that the order of removal and order to depart voluntarily are the *same order* under 8 C.F.R. § 1240.26(d).

For this reason, the courts of appeals have expressly recognized that a request to stay voluntary departure presents a question that is a "substantive" and not merely a "procedural" matter. *Alimi* v. *Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004). The Seventh Circuit, for instance, has held that "extend[ing] the time for voluntary departure" upon a motion to stay removal "would be incompatible with the structure of [18 U.S.C.] § 1229c," which states that "courts have no authority to grant voluntary departure on their own." *Alimi*, 391 F.3d 891-92. Because, in its view, the Sixth, Eighth, and Ninth Circuits' rule upsets the alien's "incentive to depart" under the voluntary departure program, the Seventh Circuit concluded that courts may not "extend the time [for voluntary departure] as a byproduct of" a decision upon a motion to stay only removal. *Id.* at 893.

The Ninth Circuit, by contrast, has concluded that "IIRIRA does not specify the circumstances in which we may issue a stay of voluntary departure," and therefore that there is "no statutory bar to using our equitable powers to construe [a] motion to stay removal as including a request to stay voluntary departure." *Desta* v. *Ashcroft*, 365 F.3d 741, 747-78 (9th Cir. 2004). Because construing a motion to stay removal also to request a stay of voluntary departure does not require the court "to review * * * a decision [of the BIA under 8 U.S.C. § 1229c(f)]," and is therefore permissible under that provision, it "serves the purposes of our asylum law, as well as the interests of justice, to construe motions to stay removal as including motions to stay voluntary departure." *Id.* at 748.

No matter which side has the better of this dispute, the question presented requires the interpretation of both statutory and regulatory law. It is a matter on which uniformity is essential.

B. Resolution Of The Question Presented Applies Broadly To Thousands Of Immigration Cases Every Year.

The government's contention that the question presented is "exceedingly narrow" (Opp. 11) and that the number of cases affected by its resolution is "diminishing significantly" (Opp. 15) is also plainly wrong. Although the government is correct to note "that IJs grant voluntary departure in only 10% of all removal cases" (Opp. 18), IJs resolved more than *220,000* removal cases in 2006.[2] Voluntary departure was therefore granted in more than *22,000* cases in 2006 alone. Moreover, litigants appealed their removal cases to the federal courts of appeals nearly 12,000 times in 2006. The issue presented here could arise in all such cases. *Cf. Desta*, 365 F.3d at 749 (noting that its approach affected "hundreds of aliens").

As we have explained, moreover, the relevance of the resolution of the question presented is not merely theoretical. See Pet. 19. In the Ninth Circuit, every litigant who petitions for review during the voluntary departure period benefits from that court's holding in *Desta* that a motion to stay removal includes a motion to stay voluntary departure. In the four months that have elapsed since this petition was filed, the Ninth Circuit's rule has been applied in at

---

[2] U.S. Department of Justice, Executive Office of Immigration Review, *FY 2006 Statistical Year Book*, tbl. 14 (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf.

least *thirty-six* cases. See, *e.g.*, *Baena* v. *Gonzales*, 235 Fed. App'x 646, 647 (9th Cir. Aug. 22, 2007). Indeed, the Ninth Circuit has cited *Desta* in more than seven hundred immigration cases since 2004. To the extent that this Court is persuaded by the government's argument that both it and the courts of appeals must have detailed notice of what relief a litigant is seeking (see Opp. 17-19), the government is being prejudiced in every such case. Resolution of the question presented therefore is a matter of great practical importance.[3]

C. The Second Circuit's Rule Is Inefficient And Unfair.

1. The government provides no basis to believe that the Second Circuit's resolution of the question presented is correct. Although the government con-

---

[3] The government is wrong in asserting that this case may not be a suitable vehicle for resolution of the question presented because the court below failed to "act[] on petitioners' motions to stay their orders of removal." Opp. 6-7 n.6. In response to assurances by the government that it will not remove aliens while their appeals are pending, the Second Circuit as a matter of policy does not issue formal stays in immigration cases. *Ibid.* For this reason, both the government and the Second Circuit treated the petitioners' stay motions in this case as granted; neither suggested below that failure to issue a formal stay had any bearing on the question presented here. In fact, the government expressly acknowledges that it "did not argue below that the court of appeals' failure to enter a stay order in this case * * * precluded a holding that petitioners' voluntary departure periods had been suspended [by their motions to stay removal]." *Ibid.* The stay practice of the Second Circuit therefore has no bearing on the suitability of this case fore review. In addition, it would be perverse were the government able, having induced the Second Circuit not to formally rule on stay motions, to use the absence of such rulings as a basis for denying relief on the ground that stays had not formally been entered.

tends that the decision below "works no unfairness in this particular case," plainly it does. Under the panel's rule, petitioners will be expelled from the country simply because they omitted three words – "and voluntary departure" – from the caption of their stay motion. This unfairness is exacerbated by the fact that Second Circuit precedent may reasonably have led petitioners to believe their motion to stay removal necessarily encompassed a request to stay voluntary departure. See Pet. 15-16.[4]

Moreover, the government could not possibly have been in doubt about the relief sought by petitioners or by the innumerable other aliens in their situation. Although the government argues that "the equitable considerations regarding stays may play out differently with respect to" removal and voluntary departure (Opp. 17), it fails to provide a *single* example of how or when the equities would weigh differently in the two situations. It is hard to imagine that they ever would, as the Third, Sixth, and Ninth Circuits have recognized. See, *e.g.*, *Obale* v. *Att'y Gen.*, 453 F.3d 151, 161 (3d Cir. 2006); *Macotaj* v. *Gonzales*, 424 F.3d 464, 467 (6th Cir. 2005); *Desta*, 365 F.3d at 748.

2. Additionally, the government does not dispute that, if its rule prevails, ineffective assistance of counsel claims would be available – under binding

---

[4] The government's observation that *Foti* v. *INS*, 308 F.2d 779 (2d Cir. 1962) involved an *automatic* stay (Opp. 19 n.13) has no bearing on the relevance of that case. *Foti* put petitioners on notice that after a stay of *deportation* is dissolved, aliens retain the opportunity to *depart voluntarily*. Petitioners could not have expected a different rule to apply merely because under prevailing law in 2002, the stay had to be issued by the court rather than by operation of law.

circuit precedent – to aliens whose attorneys fail to file separate motions. Such a result will clog the courts' dockets with unnecessary appeals and provide an end-run around the Second Circuit's resolution of the question presented. See Pet. 25.

The government does contend that "this Court's decisions do not support" ineffective assistance claims in immigration cases. Opp. 18 n.11. But whether this contention is right or wrong (and we suggest that it is incorrect), it is entirely beside the point. As the government concedes, numerous lower courts *do* in fact recognize such claims. See, *e.g.*, *Saakian* v. *I.N.S.*, 252 F.3d 21 (1st Cir. 2001) (allowing motion to reopen before BIA due to ineffective assistance in earlier proceedings); *Rabiu* v. *I.N.S.*, 41 F.3d 879 (2d Cir. 1994) (same); *Castillo-Perez* v. *I.N.S.*, 212 F.3d 518 (9th Cir. 2000) (same). Even the BIA has recognized that "egregious" ineffective assistance of counsel constitutes grounds to reopen. *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988). In fact, every circuit to have adopted the Second Circuit's rule regarding the question presented in this case recognizes ineffective assistance of counsel claims in immigration cases. Accordingly, there is every reason to believe that the rule below will prompt a spate of ineffective assistance claims, further burdening the courts' dockets with immigration appeals.

D. The Attorney General's Issuance Of A Proposed New Regulation Regarding Voluntary Departure Provides No Basis For Denying Review In This Case.

Ten days before the government filed its brief in opposition in this case, the Attorney General issued the proposed rule relevant to judicial stays of voluntary departure that is cited in the brief in opposition

(at 15-16). That proposed rule provides no reason to deny review in this case.

First, the regulation cited by the government is only *proposed*. It is entirely speculative if, and in what form, the regulation will be adopted. According the proposed rule, if an alien who has been granted voluntary departure decides to challenge a ruling of the IJ or BIA, the Attorney General will automatically revoke the grant of voluntary departure. 72 Fed. Reg. 67,674. This would present litigants with a Hobson's choice – to either (a) remain in the country illegally while challenging the administrative ruling and, if unsuccessful on appeal, be subject to forced removal; or (b) appeal the administrative ruling after leaving the country, which in some cases may force an alien to return to a country where he or she faces a serious threat of physical harm or death. This controversial proposal will surely be subject to vigorous, prolonged debate with no certainty of ultimate adoption.[5]

Second, the proposed regulation is contrary to federal immigration law, further undermining the likelihood of its adoption. The regulation proposes that an alien "will not be subject to the penalties for failure to depart voluntarily" while appealing an immigration decision. 72 Fed. Reg. 67,674 92007). But the executive has no statutory authority to make this

---

[5] Given the long timeframe necessarily involved with promulgation of a regulation, it is unclear whether – even if approved – the regulation cited by the government would enter into force during the current administration. Both the Clinton and Bush administrations, upon taking office, withdrew all proposed regulations that had not yet gone into force. 58 Fed. Reg. 6074-01 (Jan. 25, 1993) (withdrawing all regulations not finally published); 66 Fed. Reg. 7702-01 (Jan. 20, 2001) (same).

guarantee – these penalties are *required* by statute. See 8 U.S.C. § 1182(a)(9)(A) & (B) (providing ten-year bar to admission if an alien departs the country "while an order of removal was outstanding" or if an alien is "unlawfully present in the United States for one year or more"); *id.* (three-year bar if an alien overstays voluntary departure by "180 days but less than one year"). On its face, the proposed regulation therefore appears squarely to contradict statutory law.

Moreover, the proposed regulation would impermissibly undermine orders by the federal courts of appeals to preserve the status quo pending judicial review. The tentative regulation proposes that if an "alien files a petition for review * * * any grant of voluntary departure shall terminate automatically *upon the filing of the petition*." 72 Fed. Reg. 67,686 (2007). But when, as here, an alien seeks a stay *before* the filing of the petition for review, the regulation may cancel an order that has already been stayed. As the government admits, the courts have interpreted 8 U.S.C. § 1229c(b)(2) to permit equitable stays precisely to avoid such a result. Opp. 12 & n.8. There accordingly is substantial reason to doubt that the proposed regulation will take effect as promulgated.

Finally, review remains appropriate because the proposed regulation would have no impact on the thousands of cases currently pending before the federal courts of appeals. See, *e.g.*, Dan Eggen, *Immigration Backlog Forces Justice to Shift Staffing: Hundreds of Lawyers Being Reassigned to Deal With More Than 4,000 Appeals in New York City*, Washington Post, Dec. 14, 2004, at A11 (noting backlog of more than 4,000 immigration appeals in the Second Circuit alone). The government concedes that the

rule would apply prospectively only. Opp. 16. The regulation thus would not apply to the thousands of immigration cases now pending or to the many more that will be filed prior to the hypothetical implementation of the proposed regulation. See *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 237 (1964) (review is appropriate where "a considerable number of suits are pending in the lower courts which will turn on resolution of * * * [the] conflict among the circuits as to" the question presented). The question presented thus plainly warrants review.

E. If the Court Does Not Grant Review, It Should Hold This Case Pending Disposition Of No. 06-1181, *Dada* v. *Mukasey*.

Although we believe the importance of the decision below and the lack of uniformity on a significant matter of immigration law warrant the Court's immediate attention, if the Court disagrees it should, at a minimum, hold this case pending disposition of *Dada* v. *Mukasey*, cert. granted, No. 06-1181 (to be argued Jan. 7, 2008).[6] Much like the present case, *Dada* concerns the interplay between orders of removal and voluntary departure. There, the Court will decide whether "an alien *must* be afforded" a tolling of voluntary departure upon "a timely filed petition to reopen." *Kanivets* v. *Gonzales*, 424 F.3d 330, 335 (3d Cir. 2005) (emphasis added). This question bears on the present case because, although governing regulations permit aliens to "seek an administrative stay of their *removal* orders" during a

---

[6] The government is correct to note that petitioners did not refer to *Dada* in their petition for certiorari. Opp. 20. Petitioners filed their petition on August 22, 2007. This Court granted the petition for certiorari in *Dada* on September 25, 2007.

pending motion to reopen, the regulations do not expressly permit stay of a grant of voluntary departure. *Dada*, Br. of Pet. at 31 (emphasis added) (citing 8 C.F.R. §§ 1003.2(f)). Thus, the Court must decide in *Dada* whether the authorization to issue stays of removal also permits the tolling of voluntary departure. Because that question concerns the relationship between removal and voluntary departure, a consideration that also is at play in this case, the forthcoming decision in *Dada* may illuminate the question presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

IRINA KOGAN
1612 Avenue Y
Brooklyn, NY 11235

Counsel for Petitioners

DECEMBER 2007